



2003

Annual Report

Attorney General of Washington

Christine O. Gregoire, Attorney General
1125 Washington Street SE • PO BOX 40100
Olympia, Washington 98504-0100
Visit us on the internet at www.atg.wa.gov

To the Citizens of Washington State:

I am pleased to present the Office of the Attorney General's Annual Report for 2003, highlighting the accomplishments of the office over the last year.

This report documents not only the hard work done by the dedicated staff of this office, but illustrates their commitment to public service and making Washington a great place to live.

The Attorney General's Office is a large and diverse office with a mission that affects the lives of every Washingtonian. This office serves clients in more than 230 state agencies, boards and commissions, as well as the state's community colleges and universities. The issues we work range from protecting consumers and the state's most vulnerable citizens to helping preserve Washington's abundant natural resources.



After serving 11 years as this state's Attorney General, I firmly believe this office is one of the best law firms in this state and I am very proud of the hard work we do representing the interests of Washington citizens.

I am grateful for the opportunity to present this report to you and I sincerely hope you find the information informative and interesting.

Sincerely,

A handwritten signature in blue ink that reads "Christine O. Gregoire". The signature is fluid and cursive, with the first name "Christine" and last name "Gregoire" clearly legible.

*Christine O. Gregoire
Attorney General*

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Office-Wide Initiatives



SafetyNet

The office continued its public education efforts on Internet and high tech crime through its comprehensive Internet-safety campaign entitled, SafetyNet. Attorney General Christine Gregoire gave presentations to more than 1,500 students in 23 middle schools around the state. She also met with parent groups, civic organizations and nearly every law enforcement agency in Washington.

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Tobacco

The office continued to work on enforcement of the tobacco Master Settlement Agreement. Attorney General Gregoire participated in several multi-state enforcement actions and settlements with retail stores and smaller tobacco companies that resulted in nearly \$3 million in additional tobacco funds to the state.

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Domestic Violence

The Attorney General's Office worked on several initiatives related to Domestic Violence.

Officer Involved Domestic Violence

Following the murder of Crystal Brame by Tacoma Police Chief David Brame, the office led an effort to explore the issue of domestic violence when police officers are involved. More than 400 law enforcement officers, city officials, domestic violence victim advocates, and others attended a day-long symposium to learn and discuss this important issue.

Teen Dating Violence

In partnership with the Washington State Medical Association and the National Crime Prevention Council, the office developed a teen dating violence brochure based on information already included on the AGO website. Copies were distributed to doctors as well as school nurses and counselors statewide.

The office's Domestic Violence Action Committee developed a teen dating violence teaching module that was piloted in seven schools. The module included a music video and a classroom discussion guide for teachers.

"Attorney General Gregoire participated in several multi-state enforcement actions and settlements with retail stores and smaller tobacco companies that resulted in nearly \$3 million in additional tobacco funds to the state."

Office-Wide Initiatives

"The office embarked on a comprehensive public education campaign on compelling consumer issues like identity theft, Internet safety, wireless phones, spam and prescription drugs."

- **Consumer Protection**

- **Fraud Fighter Program:**

- The Attorney General’s Office, AARP and the Retired Senior Volunteer Program launched the Fraud Fighter campaign. The Fraud Fighter campaign is an outreach partnership established to raise awareness about common scams that target seniors and build a peer information network aimed at reducing the rate of fraud against Washington’s older adults. To date, more than 1,000 volunteers have been trained to provide this information to groups within their own communities.

- **Drug Smart**

- The office worked with AARP in a consumer education campaign to help citizens be Drug Smart. The Drug Smart public education program launched in August. The goal of this campaign was to help people save money through the smart and safe use of prescription drugs.

- **Get the Facts**

- The office embarked on a comprehensive public education campaign on compelling consumer issues like identity theft, Internet safety, wireless phones, spam and prescription drugs. The “Get the Facts” campaign included paid radio and television spots that ran on the Seattle Mariner Radio Network and during the “Mojo Minute” on KOMO-TV news from June through September. Corresponding information was placed on the AGO website.



- **2003 Legislation**

- Three Attorney General-request bills made it through the Legislature and were signed into law in 2003.

- **Protecting Kids Online**

- This bill amended the state Communication with Minor for Immoral Purposes statute to allow law enforcement to arrest and convict an Internet predator who believes he is communicating with a minor. Under the former law, a child must be present.

- **Spam**

- This new law clarifies Washington’s unsolicited commercial email or “spam” statute by explicitly stating that actions against spammers -- both in-state and out-of-state -- may be brought in district courts. This change was necessary to clarify any ambiguities regarding the jurisdiction of the district courts and to ensure that individual plaintiffs are able to exercise their rights under Washington’s spam statute.

- **Tobacco Escrow Funds**

- This new law modifies the tobacco escrow fund provisions by closing loopholes in the former law which allowed manufacturers with sales

Office-Wide Initiatives

in one or just a few states to obtain a refund of all or most of their escrow payment.

U.S. Supreme Court

Locke v. Davey – Prohibition Against State Funding for Religious Instruction

Solicitor General Narda Pierce argued a case before the U.S. Supreme Court that concerned the use of public money to fund an individual's divinity studies. Washington's Constitution and a state statute prohibit the expenditure of public money for that purpose. In the case, *Governor Gary Locke, et al. v. Joshua Davey*, the Attorney General represented the defendants, who included the Governor and members and staff of the state Higher Education Coordinating Board. Plaintiff Joshua Davey, a divinity student, sued the state claiming his First Amendment right to freely exercise his religious beliefs was violated by his ineligibility to receive a taxpayer-funded Promise Scholarship. The scholarship program is administered by the board. The state argued that it is constitutionally permissible for a state to decide that taxpayers will not pay for divinity studies. The case was argued on December 2. A decision is expected sometime in 2004.

Washington Legal Foundation v. Legal Foundation of Washington

The U.S. Supreme Court concluded in a five-to-four decision last June that Washington's Interest On Lawyer Trust Accounts (IOLTA) program did not run afoul of the U.S. Constitution. The office represented eight justices of the Washington Supreme Court in the case before the U.S. Supreme Court in December 2002. The case determined the constitutionality of a state Supreme Court rule that generates money for civil-justice programs, including legal services for indigents. The IOLTA rule requires lawyers and licensed real estate closing officers who have temporary custody of client trust funds to invest those funds in interest-bearing accounts. Individual trust funds that would not generate positive net interest for the client are combined, and the resulting interest is used by the Washington Legal Foundation to provide legal services for indigents. Plaintiffs sued the state Supreme Court justices and the Washington Legal Foundation, claiming the IOLTA program violated the First and Fifth Amendments to the U.S. Constitution. The case was argued by Sr. Assistant Attorney General Marnie Hart for the justices; and by the Seattle law firm Perkins Coie for the Washington Legal Foundation.

Blanket Primary

The state has asked the U.S. Supreme Court to review a 9th U.S. Circuit Court of Appeals decision that ruled Washington's blanket primary unconstitutional. The petition for writ of certiorari requests review of the 9th Circuit's decision that struck down Washington's blanket primary last September, asserting that it operates differently from a California primary rejected as unconstitutional by the U.S. Supreme Court in 2000. The state asked for the review on the basis that the lower court wrongly struck down a

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Solicitor General Team



Summary of Responsibility

The Solicitor General Team was created in 1993. Its role is to provide the following services:

- Coordinate cases at the appellate levels in both state and federal courts, and conduct appellate assistance and review programs for the Attorney General's Office;
- Coordinate the office's involvement with cases in the U.S. Supreme Court;
- Be primarily responsible for the preparation of formal Attorney General Opinions;
- Coordinate the office's involvement with amicus curiae "Friend of the Court" briefs in all courts;
- Carry out the Attorney General's duties with respect to the preparation of ballot titles and explanatory statements, and represent the state in litigation involving the powers of initiative and referendum;
- Coordinate legal advice on issues of statewide significance;
- Chair the Ethics Committee, the office's primary resource on matters of professional responsibility;
- Serve as the office's liaison to the state bar association;
- Serve as legal counsel to the Secretary of State, Lieutenant Governor, and the Administrator for the Courts.

Legal Services Provided

A large part of the team's role is consulting with other divisions of the office concerning appellate practice, or coordinating the office's client advice on issues of statewide significance. The team has primary or exclusive responsibility for several major cases, and a secondary role in dozens of others. The Solicitor General Team also provides a great deal of legal advice through the preparation of formal opinions and interpretative memoranda, consultation with other divisions, or directly to agencies.

Solicitor General Team

"During the same period, the office cleared 25 opinions. Ten formal opinions were issued on subjects as diverse as the authority of school districts to engage in fundraising, the duty of four-year colleges to engage in collective bargaining, and the extent to which mosquito control districts may levy assessments on city-owned property."

Numbers/Trends

- The team received notice of 320 new appeals and formally consulted 381 times with other divisions concerning appeal questions or other strategies.
- The team arranged conferences with the Attorney General in 14 cases before the State Supreme Court.
- The team coordinated practice arguments in 79 appellate cases.
- Between December 1, 2002, and December 1, 2003, the office received 51 opinion requests for processing. Thirty were accepted. Twenty requests were rejected because the requests involved matters in litigation or were not within the scope of the statute on Attorney General Opinions. One request was withdrawn. During the same period, the office cleared 25 opinions. Ten formal opinions were issued on subjects as diverse as the authority of school districts to engage in fundraising, the duty of four-year colleges to engage in collective bargaining, and the extent to which mosquito control districts may levy assessments on city-owned property. Fourteen were issued as informal opinions on a wide variety of topics. Four opinion requests were handled by a general letter but not by a written opinion.
- Between December 1, 2002, and December 1, 2003, the team reviewed 127 requests for participation as amicus curiae or "Friend of the Court". Of the 127 requests, the office joined or authored 51 briefs. Five briefs supported petitions for certiorari to the U.S. Supreme Court and 16 briefed the merits of cases accepted by the U.S. Supreme Court. The office was the sole or primary author of 16 amicus briefs filed in various courts.
- Between January 1 and December 1, 2003, members of the team processed 91 ballot measure titles (twice as many as during the same portion of 2002), consisting of 60 Initiatives to the People, 29 Initiatives to the Legislature, 1 referendum measure, and 1 referendum bill. Nine initiatives were withdrawn. Three ballot titles were appealed to the superior court. Two measures were certified for the 2003 general election and explanatory statements for the Voters Pamphlet were provided.

Significant Cases and Issues

- **Prohibition Against Funding Religious Instruction:** Article I, section 11 of the Washington Constitution prohibits appropriating or applying public funds for religious instruction. The Legislature has authorized college scholarships for low income students in the top 15 percent of their graduating class. Applying the prohibition in article I, section 11, the Legislature provided that the scholarship may not be used to pursue a degree in theology.

Solicitor General Team

This restriction was challenged by a student who met the income and academic requirements of the scholarship, but who was seeking a degree in theology. The federal district court ruled in favor of the state but the Ninth Circuit Court of Appeals reversed the decision. The Ninth Circuit ruled that the restriction on the scholarship violated the Free Exercise Clause of the U.S. Constitution. Members of the Solicitor General's Team worked with attorneys in the Education Division to prepare a petition for a writ of certiorari for the U.S. Supreme Court. The court granted the petition and the team prepared the briefs on the merits. The Solicitor General argued the case, and is awaiting a decision.

Legal Services For Low Income Persons: A member of the Solicitor General Team participated in successfully defending an ethical rule of the Washington Supreme Court that governs lawyers and other licensed legal professionals. The rule requires client trust funds held by a legal professional to be placed in an interest-bearing account for the client, whenever the client's funds can earn net interest for the client. If the client's funds cannot earn net interest for the client, typically when they are small or held for a short period, the rule requires the funds to be deposited in a pooled interest-bearing account with like funds of other clients. Interest earned on the pooled account is paid to the Legal Foundation of Washington and is distributed to organizations providing legal services for low-income persons. A nonprofit law center, two licensed legal professionals, and two clients whose funds were deposited in a pooled interest-bearing account under the rule, allege that the rule takes their property in violation of the Fifth Amendment and is invalid under the First Amendment. The Ninth Circuit Court of Appeals rejected the Fifth Amendment challenge, and remanded the First Amendment claim to the district court. The U.S. Supreme Court granted certiorari on the claim that the rule takes property in violation of the Fifth Amendment and rejected the claim.

Blanket Primary: Since 1936 Washington has used a system known as the blanket primary as a means of qualifying candidates for elected office to the general election ballot. Under this system, voters can vote for any candidate of their choice at the primary, without limitation based on party affiliation. In 2000 the U.S. Supreme Court ruled that California could not continue to use that state's blanket primary system over the objection of the political parties. Political parties filed a lawsuit against the Secretary of State in federal court in Washington, challenging the continued use of the blanket primary in this state. Judge Franklin Burgess of the U.S. District Court granted summary judgment in favor of the state and upheld the blanket primary. In September 2003 the U.S. Court of Appeals for the Ninth Circuit reversed, holding that Washington could not constitutionally continue using the blanket primary. The appellate court later denied requests for the full court to rehear the case. The state has asked the U.S. Supreme Court to hear the case. Attorneys from the Solicitor General Team and the Attorney General's complex litigation unit are defending that lawsuit. Attorneys from the Solicitor General's Team are also working with the Secretary of State and the Legislature regarding potential alternatives to the blanket primary.

"A member of the Solicitor General Team participated in successfully defending an ethical rule of the Washington Supreme Court that governs lawyers and other licensed legal professionals."

Solicitor General Team

"The Solicitor General Team, working with attorneys from the Social and Health Services Division, defended a challenge to Department of Social and Health Service's (DSHS) use of social security benefits to pay for a child's foster care."

- **Voting Rights of Convicted Felons:** The Washington Constitution makes convicted felons ineligible to register and vote until their civil rights have been restored upon completion of their sentences. A group of convicted felons filed suit in federal court, alleging that this restriction conflicts with the federal Voting Rights Act. An attorney from the Solicitor General's Team, along with an attorney in the Criminal Justice Division, have defended the state's constitutional provision. In December 2000 a federal judge ruled that the state's provision is legal and does not conflict with federal law. In July 2003 the U.S. Court of Appeals for the Ninth Circuit entered a decision returning the case to the district court for further consideration of whether the Voting Rights Act requires the state to permit felons to vote. The state's request that the full appellate court reconsider that decision is currently pending.
- **Election Reform:** After the 2000 Presidential election, Congress passed a new federal law that changes, in some ways, the method for conducting future elections. Known as the Help America Vote Act, the new law also provides federal funds to partially pay for the costs of modernizing the voting systems used to conduct future elections. An attorney from the Solicitor General's Team is working with the Office of the Secretary of State to provide legal advice as they implement this new federal law.
- **Use of Social Security Benefits to Pay For Foster Care:** The Solicitor General Team, working with attorneys from the Social and Health Services Division, defended a challenge to Department of Social and Health Service's (DSHS) use of social security benefits to pay for a child's foster care. When a child is declared dependent and placed in foster care with DSHS, the department applies for social security benefits on behalf of the child. If DSHS is appointed by the Social Security Administration as the child's representative payee, it may use the benefits to pay for the cost of the child's foster care in accordance with the rules of the Social Security Administration. The Washington Supreme Court ruled that it was improper for the department to use benefits to pay for the cost of care. The U.S. Supreme Court issued a stay and granted DSHS's petition for a writ of certiorari. Attorney General Gregoire argued the case in December 2002. In February 2003 the U.S. Supreme Court unanimously reversed the Washington Supreme Court. The U.S. Supreme Court ruled the social security statutes and regulations authorize DSHS to use a child's social security benefits to help pay for the cost of the child's care. The case was remanded to the Washington Supreme Court to resolve two constitutional issues that had not been previously addressed. A member of the Solicitor General's Team, working with attorneys from the Social and Health Services Division briefed the constitutional issues and reargued the case to the Washington Supreme Court. The office is awaiting a decision.
- **Petition Method of Annexation:** In *Grant County Fire Protection District v. Moses Lake*, the fire protection district challenged the constitutionality of the petition method of annexation. The Supreme Court issued a decision ruling that the petition method violated article I, section 12 of the Washington Constitution. The Supreme Court subsequently granted reargument and a member of the Solicitor General's Team prepared an amicus brief, on behalf of the Governor and the cities granted a member of the Solicitor General's

Solicitor General Team

Team part of their time for oral argument. After reargument, the Supreme Court reversed its earlier decision and ruled that the petition method of annexation did not violate article I, section 12.

Initiative 773: The Solicitor General's Team successfully defended Initiative 773 against a lawsuit by sellers of tobacco products. Initiative 773 increased cigarette and other tobacco taxes to fund low-income health care and other programs. The challengers contended that Initiative 773 fails to satisfy constitutional requirements governing appropriations and requiring bills to contain a single subject expressed in the bill title. The Thurston County Superior Court upheld the Initiative and the Washington Supreme Court affirmed.

Initiative 776: In November of 2002, the Washington citizens enacted Initiative 776, which would repeal certain local-option motor vehicle taxes and fees. Shortly after the election, two of the counties which had imposed these fees, joined by a city and several individuals, challenged the constitutionality of the Initiative on several grounds. In January, the King County Superior Court declared the initiative unconstitutional on grounds that it violated the "double subject" prohibition in the state constitution and that it would impair King County's bond obligations. The case was appealed to the state Supreme Court, which issued an opinion on October 30, 2003, reversing the Superior Court and upholding the constitutionality of Initiative 776. Motions for reconsideration were pending in December 2003, and there are additional unresolved issues requiring a remand to the trial court. A member of the Solicitor General's Team is working with two attorneys from the Licensing and Administrative Law Division to defend the Initiative.

Referendum 53: Referendum 53 seeks to prevent certain unemployment tax changes enacted by the Legislature from going into effect. These increases were part of a general overhaul of the unemployment compensation system. A coalition of labor and business organizations brought an original action in the Washington Supreme Court seeking a writ of mandamus to prevent Referendum 53 from going on the ballot. The coalition claimed that the underlying law was not subject to referendum under the constitution because it may be necessary for the support of public institutions. One member of the Solicitor General's Team represented the Governor, who intervened in the case on the side of the petitioners. Another team member represented the Secretary of State. The case was originally argued in September and the Supreme Court declined to rule due to lack of time before the election. Referendum 53 was rejected by the voters and the coalition filed a new petition in the Supreme Court. The Governor intervened again. A second oral argument was held and the Supreme Court issued an opinion holding that Referendum 53 properly appeared on the ballot.

Child Pornography: A member of the Solicitor General's Team defended a challenge to the constitutionality of RCW 9.68A, which prohibits child pornography. The federal district court entered summary judgment in favor of the state and upheld the law.

Protecting Consumers and Legitimate Businesses

Antitrust Division



Summary of Responsibility

The Antitrust Division enforces state and federal laws protecting consumers and businesses from anticompetitive practices such as price-fixing, bid rigging, monopolization and other conduct that interferes with fair competition. The division also is charged with helping the Insurance Commissioner review insurance companies' conversions to for-profit status.

"In 2003 the Antitrust Division settled cases which will result in \$26 million in restitution to consumers and state agencies."

Legal Services Provided

The majority of the division's work focuses on representing consumers and state agencies in litigation seeking redress for violations of antitrust laws. The division also provides legal counsel to state agencies concerning antitrust-related matters.

Numbers/Trends

In 2003 the Antitrust Division settled cases which will result in \$26 million in restitution to consumers and state agencies. The El Paso energy settlement will result in restitution payments of up to \$21 million over time, with over \$7.4 million paid in 2004. Additionally, in the pharmaceutical cases, the Antitrust Division settled cases which will result in over \$1 million for direct consumer restitution, approximately \$1 million for *cy pres* consumer restitution and \$3.2 for state agencies.

As follow-up to a prior settlement, music compact disc purchasers will receive their claim checks. Approximately 213,000 Washington consumers will receive checks totaling \$2.9 and Washington schools and libraries will receive \$1.5 million worth of music CDs.

Significant Cases and Their Impact

Pharmaceutical Cases

Cardizem CD Antitrust Litigation: This multistate action alleged that a brand name manufacturer of a heart medication paid a generic manufacturer to keep the generic off the market. The defendants, Aventis and Andrx, agreed to pay the states \$25 million for consumer restitution, plus damages

Antitrust Division

"BMS ultimately agreed to pay the states \$52 million in damages and restitution, plus contribute another \$7.5 million in free drugs to low income cancer patients."

- for state agencies. Almost 800 Washington consumers should receive claim payments of over \$350,000 and state agencies will receive approximately \$126,000.

- **Buspirone Antitrust Litigation:** This multistate action alleged that Bristol Myers Squibb, the maker of a leading anti-anxiety medication, fraudulently obtained a patent on a drug, thereby preventing generic manufacturers from entering the market. BMS agreed to pay \$41.7 million in consumer restitution. At least 942 Washington consumers will receive direct restitution. Total direct and *cy pres* distribution for Washington should be approximately \$800,000. Additionally, Washington State agencies will get approximately \$2 million.

- **Taxol Litigation:** Bristol Myers Squibb allegedly obtained a patent on a drug by withholding key information from the patent office which would have shown the drug was not legally patentable. This patent prevented generics from entering the market. BMS ultimately agreed to pay the states \$52 million in damages and restitution, plus contribute another \$7.5 million in free drugs to low income cancer patients. The division estimates that approximately 100 Washington patients will receive restitution of at least \$438 each and state agencies will receive approximately \$622,000. The case is *State of Ohio, et al. v. Bristol Myers Squibb*.

- **Lorazepam and Clorazepate Antitrust Litigation:** This multistate matter alleged that a manufacturer of a leading anti-anxiety medication attempted to monopolize the active ingredient, thereby preventing generic entry. The defendant, Mylan Labs, agreed to pay \$25 million nationally, to settle antitrust claims. In 2003, approximately \$562,000 in direct restitution was claimed by Washington residents and another \$450,000 was received for *cy pres* distribution. State agencies received approximately \$519,000.

Energy Settlements

- **El Paso:** In addition to receiving the first payment of \$8.5 million from the Williams settlement, the office also reached a settlement with the El Paso companies. California, Washington, Oregon and Nevada were part of this settlement. If a number of conditions are met, mostly having to do with California entities, El Paso will pay Washington a total of \$21.3 million over time. El Paso will pay approximately \$7.4 million in 2004 and a little over \$700,000 each year after that for 20 years.

- The state has contracted with the Seattle Foundation to help administer the settlement. The Seattle Foundation, with the assistance of Foundation Northwest of Spokane, will handle the residential consumer restitution program. The Antitrust Division, with the assistance of leading business, legislative and industry leaders, will administer the business restitution portion of the settlement.

- **Premera:** Under state law, the Antitrust Division is responsible for reviewing conversions of nonprofit insurers to for profit entities, for potential anticompetitive effects. This can be done either independently or at the request of the Insurance Commissioner. The Insurance Commissioner

Antitrust Division

has requested such assistance with respect to the Premera Blue Cross conversion and a special assistant for the division is currently undertaking that review.

Hotels: The state and Starwood Hotels and Resorts settled litigation which was focused on the degree to which the Sheraton and Westin hotels must compete for customers.

Surgical Specialists of Yakima: Along with the Federal Trade Commission, the division obtained a settlement with surgeons in the Yakima area who were jointly negotiating their fees with insurance companies. The group agreed to change its business structure.

Seattle Times/PI Joint Operating Agreement: The division is reviewing the Seattle Times/PI JOA dispute, jointly with the U.S. Department of Justice.

Mergers: The division is part of a multistate group reviewing Oracle's attempted takeover of Peoplesoft. The Echostar/Hughes merger was abandoned after several states and the DOJ challenged it. The division reviewed, but did not object to, a number of other transactions.

Consumer Protection Division

"The division investigates and files legal actions to stop fraudulent and deceptive practices, recovers refunds for consumers, and imposes penalties on offending businesses, as well as recovers attorneys' fees and costs incurred in taking such actions."

● Summary of Responsibility

- The Consumer Protection Division enforces consumer protection laws to help keep the Washington marketplace free of unfair and deceptive practices.
- The division investigates and files legal actions to stop fraudulent and deceptive practices, recovers refunds for consumers, and imposes penalties on offending businesses, as well as recovers attorneys' fees and costs incurred in taking such actions. The division facilitates the informal resolution of consumer problems by notifying businesses of written complaints and mediating those complaints. It provides information and education to businesses and to the public on consumer rights and issues, and sends out alerts and press releases when consumers or businesses are targets of fraudulent or predatory activities.
- The division is also responsible for the administration of Washington's Lemon Law for new motor vehicle warranty enforcement. This law helps owners of new vehicles with continuing warranty problems. The services include arbitration to resolve consumer and manufacturer warranty disputes, consumer and industry education and enforcement of manufacturer and dealer obligations.

● Legal Services Provided

- **Overall Priorities:** In 2003, the division emphasized efforts to educate, mediate, arbitrate and undertake enforcement actions in five key areas: privacy/identity theft, spam, Internet safety, prescription drugs and wireless communications.
- **Education:** The division increased public education and outreach efforts to consumers and businesses in the state. The division seeks to educate the public about its rights and responsibilities as well as remind legitimate businesses of the proper way to do business in Washington. The division works with a variety of public and private partners to increase its visibility so the public sees it as a resource, and to leverage its results. Staff from the office provided consumer education to schools, senior centers, civic organizations, industry groups and the business community. Attorneys provided Continuing Legal Education seminars, and staff testified before the Legislature and Congress, held press conferences and appeared on radio and television programs.
- **Mediation:** The division provides informal mediation of consumer complaints. Six Consumer Resource Centers (CRCs), located in Bellingham, Seattle, Tacoma, Vancouver, Kennewick and Spokane, are staffed by

Consumer Protection Division

division employees, volunteers, and students to handle consumer inquiries and complaints against businesses. Our division was one of the first in the country to mediate complaints online through the Attorney General's website. Businesses are notified of written complaints and resource center staff mediate those complaints by helping settle disputes between businesses and consumers. The division is working with programs, such as the University of Washington Law School's Legal Clinic, to provide additional informal mediation resources for consumers and businesses.

Arbitration: The Lemon Law helps new vehicle owners who have continuing problems with warranty repairs of substantial defects in their new cars. The law allows the vehicle owner to request an arbitration hearing of Lemon Law disputes with manufacturers through our office. Arbitration hearings are less complicated than court trials. There are no formal rules of evidence or court procedures. Vehicle owners and manufacturers are each given the opportunity to present their version of the facts and have an arbitrator render a decision.

Investigation: Division investigators develop cases by interviewing witnesses, gathering documentary evidence and other information, and analyzing and reporting on the evidence and information obtained. Paralegals assist in these efforts by processing and preserving documentary evidence, preparing drafts of pleadings and other legal documents and conduct legal research.

Enforcement: The division investigates cases and takes enforcement action when necessary. If a business engages in conduct that involves unfair or deceptive practices, legal action may be taken to seek a court ordered injunction to stop the unfair or deceptive behavior and, if appropriate, recover consumer refunds, assess civil penalties, and recover costs and attorney fees. The legal team works closely with other states and agencies, such as the U.S. Department of Justice, the Federal Trade Commission (FTC), as well as with federal and county prosecutors to refer cases, conduct investigations and prosecute individuals who commit crimes, unfair acts or deceptive practices against consumers.

"The division undertook investigation and enforcement actions resulting in over \$1.2 million in total recoveries, including multi-state cases."

Numbers/Trends

The division undertook investigation and enforcement actions resulting in over \$1.2 million in total recoveries, including multi-state cases. Of the total recoveries, more than \$100,000 will be disbursed to Washington consumers as direct restitution. The division was awarded over \$800,000 as reimbursement for investigation and attorney fees and costs incurred for the calendar year. In addition, \$100,000 was awarded for consumer education and more than \$200,000 was recovered and returned to the state's general fund.

Informal mediation of consumer complaints against businesses by the CRCs without litigation or enforcement action resulted in more than \$5.5 million in additional restitution to Washington consumers.

Consumer Protection Division

"The division's online complaint center mediated 2,172 complaints and received almost 15,000 e-mail spam complaints, nearly double the number of spam complaints filed in 2002."

- The division provided the following services to Washington consumers and businesses:
- The division's six CRCs fielded more than 176,400 phone calls, greeted nearly 1600 "walk-ins" and processed nearly 25,000 complaints.
- The division's online complaint center separately handled contacts, complaints and requests for information through the Attorney General's website. Consumers filed more than 10,000 complaints online. The division's online complaint center mediated 2,172 complaints and received almost 15,000 e-mail spam complaints, nearly double the number of spam complaints filed in 2002.
- The Lemon Law program separately handled more than 17,000 telephone inquiries and requests for assistance and more than 25,000 website visits. More than 2,400 arbitration packets were mailed to consumers or downloaded from the Lemon Law website. The program had 271 Requests for Arbitration resulting in nearly \$5.2 million in refunds and vehicle replacements to Washington consumers.
- The office provided outreach to more than 30,000 people, sent more than 50,000 information brochures to consumers and had more than 1.8 million website contacts.
- The division responded to nearly 500 Public Disclosure Requests.

Significant Cases and Developments and Their Impact

Multi-State and National Cases and Settlements

Household Finance: The division did significant work to lay the groundwork for distribution of \$21 million in restitution to Washington consumers following resolution of a nationwide \$484 million consumer protection case with Household International Incorporated. Checks were sent to over 11,000 residents of Washington in December. Washington State played a key leadership role in securing the settlement involving alleged predatory lending practices. The case has had a significant positive impact on the sub-prime home lending industry.

H&R Block: Washington joined a 41 state investigation resolving concerns that H&R Block had failed to adequately disclose the inclusion of extra costs of the optional tax preparation service guarantees during the 2000 tax season. The settlement paid \$3.3 million to address a national claims program for refunds to consumers and provide money for consumer education and recovery of costs and fees to the states.

Consumer Protection Division

Other Significant Cases and Settlements

A+ Computer Program USA: This case involved allegations of misrepresentation of price, payment terms and compatibility of computers by a company that marketed in Spanish via television and telemarketers. Fifty-four Hispanic families in Central Washington were able to get their money back after purchasing computers and educational software from a company called A+ Computer Program USA. This investigation and resolution provided an excellent opportunity to bring important consumer messages to the Hispanic communities in Eastern and Southwest Washington.

Action Water Heater: This matter involved allegations of bait-and-switch tactics known as “low balling,” in which a typically competitive work estimate balloons to a greater amount. This usually occurs after work has commenced and a consumer has little choice but to proceed. In many of the cases, consumers had leaking or broken water heaters that needed immediate repair. When consumers called the company, they were told the repair would cost between \$350 to \$600. When plumbers arrived, however, they always “found” some problem, such as a code violation or other construction problems that required additional work. In most cases, there were no problems and the unnecessary work inflated bills by several hundred dollars. The firm agreed to pay up to \$10,000 in restitution and costs and fees.

NW Global Network, Inc.: This nationwide company sold magnetic mattress pads, that were represented to relieve a host of physical ailments or medical conditions, and offered a money back guarantee. Hundreds of consumers who returned the product for a refund did not receive their refunds. A lawsuit was filed and default judgment was obtained against the corporation with awards of more than \$291,000 in restitution and more than \$538,000 in civil penalties.

Pabco Roofing: A roofing products manufacturer agreed to pay restitution to hundreds of Washington consumers who purchased roofing shingles from the company, between January 1990 and the present, which were allegedly defective in appearance. The case concludes a string of housing materials cases brought by the division that challenged the performance of roofing and siding products that did not perform as advertised in our climate.

Senior Estate Legal Services, Inc.: This is an active case filed against two Bellevue based companies for violating a prior agreement to stop engaging in deceptive estate planning sales tactics that target senior citizens. The complaint alleges that its principals preyed on seniors by developing personal relationships with them in order to gain access to their financial information. The information was used to pressure the victims into buying inappropriate or useless investments, estate planning and insurance products.

Wade Cook: The division took action to enforce the state’s judgment against Wade Cook by securing an additional judgment against Wade Cook, personally for \$75,000, which was the amount of a prior judgment that remained unpaid by the corporate defendants. This action vindicates

Consumer Protection Division

"The High Tech Unit (HTU) continues to be a national leader in both bringing spam enforcement actions and shaping national policy in the regulation of spam."

- personal accountability for agreements made with the state and accomplishes a deterrence function.

● **Internet Cases and Settlements**

- **Earthlink:** The High Tech Unit (HTU) filed an Assurance of Discontinuance against an Atlanta based Internet Service Provider (ISP) with five million customers nationwide. The Assurance concerned Earthlink's practice of acquiring smaller ISPs and switching their customers' service to Earthlink without proper authorization. The Assurance radically changed Earthlink's nationwide policies, requiring notification to customers and an opportunity to cancel their service. It also provided for refunds and cancellations of improper billings.

- **Accountant's Marketing (Marketing Services of America):** This lawsuit against a Seattle online accountant referral service concluded with a default judgment in July. The service failed to provide clients to accountants for an up-front fee, as promised. The default judgment provided for \$29,650 in restitution, \$196,000 in civil penalties and \$24,798 in costs and fees. The defendant was enjoined from soliciting or offering client referral services for accountants in addition to other extensive injunctive relief.

- **Auctions:** A lawsuit was filed against a Bothell seller of gaming systems, software and digital cameras on the eBay and uBid auction sites. The defendant failed to deliver the sold products. A consent decree was filed that provided for \$15,501 in full restitution, \$4,545 in costs and fees and suspended civil penalties of \$50,000. The defendant was also enjoined from engaging in the sale or auction of any goods on Internet auction sites.

- **Smokin4Less:** In April, the office filed an action against this Virginia online tobacco seller who sold products to at least one Washington minor and failed to make Jenkins Act reports to the Washington State Department of Revenue. A default judgment against the company was entered in October that provided for \$9,073 in costs and fees, and \$16,000 in civil penalties, as well as injunctive relief prohibiting the defendants from selling to minors and failing to comply with the Jenkins Act.

- **Spam:** In 2002, the division filed a lawsuit against a Houston spammer who sent e-mail with deceptive subject lines such as "Board Meeting 3-ish" and phony names in the e-mail "From" fields. In June 2003, the division settled the case with a consent decree that provided for injunctive relief prohibiting the defendant from violating Washington's Commercial Electronic Mail Act and provided for costs and fees of \$28,000.

● **Other Significant Work of the High Tech Unit**

- **Spam:** The High Tech Unit (HTU) continues to be a national leader in both bringing spam enforcement actions and shaping national policy in the regulation of spam.

- In April, Attorney General Gregoire spoke at the Federal Trade Commission conference in Washington, D.C., on the issue of spam, the issues for state

Consumer Protection Division

enforcement authorities as well as possible legislation. In addition, our office was asked to provide testimony before a House congressional committee on the subject of state enforcement against spammers and the effect of national legislation (CAN SPAM Act of 2003).

In June, Attorney General Gregoire participated in a press conference with Microsoft to announce the filing of 15 spam enforcement actions.

Auction Sweep: In April 2003, Attorney General Gregoire went to Washington, D.C. to announce Washington's participation in an Internet auction sweep of cases co-sponsored by the Federal Trade Commission and the states. Attorney General Gregoire spoke to a national audience about the states' efforts to enforce consumer protection law against auction site scams.

Cyber Consumer Resource Center Consolidation: In September, the Cyber Consumer Resource Center was consolidated with the Seattle Consumer Resource Center. This has been a long-standing goal of the unit to transition mediation work to the CRCs who are trained to handle online mediation as well as traditional hard copy mediation work.

Public Education and Outreach

Brochures: The office provides brochures to the public. More than 18 brochures and a variety of fact sheets and other information resources are published. Many of our brochures are available in Spanish and Russian. Almost all of our brochures are available on our website.

Drug Smart: The Attorney General's Office worked with AARP in a consumer education campaign to help citizens be Drug Smart. The Drug Smart public education program launched in August. The goal of this campaign was to help people save money through the smart and safe use of prescription drugs.

Ellensburg High School: The Teen Consumer Scrapbook is a website created and maintained by teens at Ellensburg High School as part of the Family and Consumer Sciences program. The goal of this educational site is to inform youth about consumer issues of particular interest to them and to encourage problem solving and critical thinking in the marketplace.

Fraud Fighters: In October 2003, the Attorney General's Office, in collaboration with AARP of Washington and the Retired Senior Volunteer Program, launched an 18-month public education program targeting seniors called Fraud Fighters. The program will: recruit, train and network 1,000 Fraud Fighters; reach over 100,000 people throughout our state; issue periodic fraud alerts to the Fraud Fighters; make direct contact with 500 known victims through reverse boiler rooms; and increase awareness of the senior victimization issue. Ultimately, the office's goal is to deter fraudsters from targeting Washington's seniors.

Get the Facts: This was a media effort to provide consumers with the latest information on the top consumer issues such as privacy and identity theft,

Consumer Protection Division

"More than 12,000 Washington consumers were eligible for approximately \$21 million in restitution as part of the Household International settlement, the largest consumer restitution case in history."

- spam, Internet safety, prescription drugs and wireless communications. Radio and television ads ran June through September on both KOMO
- television and radio in conjunction with Mariners games. The radio spots played on the statewide Mariners Radio Network. The television spots were
- highlighted in special "Mojo Minute" portions of KOMO news and sports. Most importantly, consumers were directed to our website for additional
- information.
- **Household International Settlement - Call Center:** More than 12,000 Washington consumers were eligible for approximately \$21 million in
- restitution as part of the Household International settlement, the largest consumer restitution case in history. Consumers had only 60 days from
- the time they were notified about their eligibility until the deadline to make a decision to accept the settlement. The Attorney General's Office, in
- collaboration with the Department of Financial Institutions, established a temporary call center and toll-free telephone number for consumers who had
- questions. In addition, the division held public meetings, put information on the office's website, and notified stakeholders such as certified housing
- counselors so they were prepared to assist consumers.
- **Identity Theft:** Identity theft continues to be a top consumer concern and the fastest growing financial crime. Our office responded to a variety of
- requests from across the state to provide information and training to citizens and law enforcement. Our office provides Identity Theft Tool Kits to law
- enforcement upon request. In addition, our office has two brochures for identity theft available for consumers and businesses.
- **Internet and Your Child:** This is a three-day train-the-trainer program for
- law enforcement, prosecutors, and others interested in learning more about the Internet, computer forensics, and a variety of pitfalls that teenagers run
- into on the Internet. The trainers, then, conduct one-day classes for parents so they have the information and knowledge on how to keep their kids safe
- while using the Internet. Attorney General Gregoire has traveled the state visiting schools, talking to PTAs and parent groups to share information
- about keeping kids safe on the Internet.
- **Latino Outreach:** Our office participates in a variety of Latino outreach and culturally diverse events. Radio KDNA in Granger features a monthly
- consumer show on a variety of current issues. They also provide consumer alerts to the public. In addition, our office participates in a variety
- presentations, conferences, and contacts with the media about issues related to the Hispanic community.
- **LifeSmarts:** Our office sponsors the LifeSmarts consumer education
- program aimed at teens to improve their skills and knowledge to make informed decisions in the marketplace. Each year our office hosts the
- LifeSmarts state competition and the winning team proceeds to the National Competition. Last year Ellensburg High School won the state competition
- and traveled to Florida for the National competition.
- **Living Trust Team:** The Living Trust Team was created in response to an
- increase in the number of "living trust mill" businesses preying on senior citizens

Consumer Protection Division

in Washington State. The division is working with the Washington State Bar Association, the Department of Financial Institutions, the Office of the Insurance Commissioner and other stakeholders to eliminate these practices through business training, consumer education and strong enforcement. The interagency group has worked to reduce "trust mill" activity by educational outreach in conjunction with the Fraud Fighter program. The team has created consumer publications, written an article for the Washington State Bar News, instructed consumer centers how to help seniors avoid the scam, warned insurance salespeople not to become involved, and created a legislative group to investigate the possibility of amended legislation.

Safe Trip: This campaign featured television and radio ads, which reminded consumers that overloaded vehicles and improperly inflated tires, can lead to accidents, especially in hot weather. The ads aired throughout Washington during the summer holidays. They warned drivers to ensure that they were not putting themselves and their families at risk.

Wireless Education: The Attorney General's Office is actively working with the Wireless telephone industry to improve customer satisfaction. Division employees meet regularly and are working collaboratively with wireless carriers to develop consumer information so people have the tools they need to make informed decisions. Two web projects are completed "The Ten Things You Should Know before You Buy Wireless Telephone Service" and the Local Number Portability webpages. A brochure and other consumer information will be available in early 2004.

Public Counsel Section

"The section maintains contact with the public through a citizen advisory committee, community organizations, personal contact, and letters and telephone calls from consumers in major rate cases."

● Summary of Responsibility

- The Public Counsel Section represents consumers who would not otherwise have an effective voice regarding the rates, services, and business practices of the investor-owned telephone, electric and natural gas utilities operating in the state. Cases are conducted and issues presented in proceedings before Washington's Utilities and Transportation Commission (WUTC), in state court, and in other forums as appropriate.

● Legal Service Provided

- The Public Counsel Section advocates for the interests of consumers in major rate cases and other cases before the WUTC, by presentations at WUTC bi-weekly business meetings, through technical study groups, in court appeals, and before the Legislature and other policy makers.
- The section maintains contact with the public through a citizen advisory committee, community organizations, personal contact, and letters and telephone calls from consumers in major rate cases. The citizen advisory committee is appointed by the Attorney General to provide a sounding board for utility issues of concern to citizens. Its 15 members come from all over the state and from various backgrounds and interests. The committee meets five times a year to provide advice and to learn about current utility issues.

● Significant Cases and Their Impact

● Telecommunications

- **Qwest Sale of Yellow Pages (DEX) Business – Benefits Obtained for Consumers:** Qwest sought approval by the WUTC for the sale and transfer of its Yellow Pages directory business (Qwest Dex) to a buyout group led by the Carlyle Group for a total purchase price is \$7.05 billion. The costs and revenues associated with directory publishing have been considered part of the local phone company operations since the breakup of AT&T in 1984. Public Counsel and other consumer groups reached a negotiated settlement which provided an appropriate share of the sale proceeds to Washington customers. Under the settlement, customers received a one-time payment of \$67 million in 2003, paid as a credit on customer bills (\$31 per line). In

Public Counsel Section

addition, customers received rate protection of over \$100 million per year for a 15 year period.

Verizon \$25 Million Rate Increase Averted: Verizon, AT&T and the commission staff reached an agreement to increase residential customer rates by \$25 million to offset other Verizon revenue reductions. Public Counsel opposed the reduction on the ground that no rate case had been conducted to examine the increase and determine if it was justified. The settlement was subsequently withdrawn.

Qwest Petition to Competitively Classify Business Services Opposed Qwest filed a petition to effectively deregulate rates for its analog business services statewide. Public Counsel opposed the request on the grounds that there is insufficient evidence of effective competition in all areas of the state to justify removal of regulatory protections, particularly for small business customers outside major urban areas. Public Counsel was joined in opposition by WebTECH (the large business customer association), small business customer groups, the U.S. Department of Defense (as a telecom consumer), and large and small competitive telecommunications carriers. The commission staff supported Qwest. After extensive hearings and briefing by the parties, the commission issued a decision in December granting the Qwest petition in full.

US West/Qwest Merger Benefits Monitored: Public Counsel and other parties negotiated approval conditions for the 2000 Qwest/US West merger which continue to benefit customers. These include a three-year rate freeze in effect through 2003, infrastructure improvements, protection against consumers bearing the costs of the merger, customer specific service guarantees (e.g., bill credits for service failures), and a Service Quality Performance Program under which Qwest must pay up to \$20 million per year in credits to customers if it fails to meet service quality requirements. Public Counsel has been monitoring company compliance with the merger conditions, particularly in the area of service quality. In calendar year 2001, the first full year when Qwest's service quality is measured under the performance program, Qwest was required to pay \$3.2 million in customer credits. In calendar year 2002, Qwest payments to customers were \$1.9 million.

Energy

Pacificorp "Excess" Power Cost Case/Pacificorp Appeal: Public Counsel opposed Pacificorp's attempt to recover an additional \$16 million in "excess" power costs from consumers during a rate freeze period. The commission denied the company request, but, notwithstanding the existing Pacificorp rate case settlement which prohibited rate increases in 2004 and 2005, the commission allowed the company to file a new rate case immediately. In order to uphold the terms of the original settlement, Public Counsel has filed an appeal of the decision and will also contest the new Pacificorp rate case, filed in December 2003.

Puget Sound Energy - Resource Planning: Public Counsel actively participated, using consultants and its own staff, in Puget Sound Energy's

"Public Counsel and other parties negotiated approval conditions for the 2000 Qwest/US West merger which continue to benefit customers."

Public Counsel Section

- (PSE) detailed collaborative advisory group processes to develop an integrated resource plan (aka "least cost plan"), leading to the filing of
- PSE 2003 Least Cost Plan. Public Counsel also is a participant in the PSE Conservation Advisory Group.
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- **Federal Issues:** While the office primarily focuses on state regulatory issues, activities by the Federal Energy Regulatory Commission (FERC) have become increasingly significant for Washington consumers. In particular,
- the office has opposed efforts by FERC to continue and expand deregulation of the wholesale electricity markets in the face of the recent Western energy crisis as such efforts go beyond federal jurisdiction and threaten important Northwest public interests. Public Counsel was also active in the "Pacific Northwest refund" docket before FERC, supporting efforts by Northwest utilities to obtain relief from unreasonable energy prices they paid in the dysfunctional Western energy markets during the recent crisis period.
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Major Issues/Events

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- **Electric Utilities - Aftermath of the Energy Crisis:** The years 2000 and 2001 saw some of the most extreme wholesale energy prices on record, driven substantially by the California market debacle and compounded by historic drought conditions in the Northwest. The region suffered severe economic impacts, including plant closures and layoffs. The crisis has created upward pressure on electric rates (see energy cases above) and increased the importance of energy efficiency programs. Efforts by FERC to continue deregulatory efforts in the wholesale market are creating serious concerns for consumers in the Pacific Northwest.
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- **Telecommunications:** The movement towards a competitive telecommunications industry, especially at the local level, has a long way to go and has created much litigation. Nearly eight years ago, Congress passed the landmark Telecommunications Act of 1996, which requires local companies to open parts of their networks for the use of competitors, with payment at a fair price. In the wake of the act, the WUTC has been examining universal service, access charges, and prices for unbundled elements, and other competition issues. The FCC this year, in its Triennial Review Order, has ordered the state commission to re-examine a range of unbundling and other issues. Other major issues include service quality concerns, particularly for large local phone companies and enforcement of conditions attached to approved mergers involving Washington's largest local telephone companies, GTE (now "Verizon") and US West (now "Qwest").
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Preserving Washington's Health and Environment

Agriculture and Health Division

"The work involves the oversight of health care practitioners and facilities, regulation of activities posing threats to human health such as food processing, the conveyance of public drinking water, the application of pesticides and the disposal of radioactive materials."

● Summary of Responsibility

- The Agriculture and Health Division provides legal advice and litigation services to the Department of Health and its associated boards, commissions and committees; the State Board of Health; the Health Care Authority; the Department of Agriculture; 24 Commodity Commissions; the Department of Community, Trade and Economic Development; the Northwest Compact on Low Level Radioactive Waste Management and the Home Care Quality Authority.

● Legal Services Provided

- The division provides a full range of legal representation to its clients, including both legal advice and litigation services. The work involves the oversight of health care practitioners and facilities, regulation of activities posing threats to human health such as food processing, the conveyance of public drinking water, the application of pesticides and the disposal of radioactive materials. Other major efforts include assisting the Department of Health and the Board of Health in their bioterrorism preparedness planning; responding to emerging diseases and other health emergencies; and adoption of isolation and quarantine rules. The division advises the Health Care Authority and Public Employees Benefits Board with respect to state employees' health care benefits and the basic health plan. The division's work with the Department of Community, Trade and Economic Development includes assisting with its outreach to other state agencies and local governments on the Growth Management Act (GMA); providing legal advice to their business development, economic assistance, housing services, energy policy state building code council, community services, WorkFirst, and international trade programs; and assisting in the review of archaeological site permitting. The division assists the Department of Agriculture in eradicating and controlling serious plant pests, such as the Gypsy Moth and Citrus Longhorned Beetle; overseeing food safety in agricultural commodities, including bovine spongiform encephalopathy (commonly known as "Mad Cow Disease"); and enforcing the grades and standards laws related to shipping and exporting billions of dollars worth of this state's agricultural products. The division advises and represents its client agencies in their implementation of legislative initiatives to promote community and economic development and public health.

Agriculture and Health Division

Numbers/Trends

Most of the division's Department of Health litigation caseload involves administrative disciplinary actions against health professionals. While the number of cases has remained relatively constant, the hearings have become increasingly complex. Rising health care costs, particularly for prescription drugs, and greater difficulty in accessing health care have garnered increasing attention from both the Department of Health and the Health Care Authority.

The Department of Agriculture is responsible for controlling plant and animal pests that threaten the state's agricultural commodities. Given the increase in the number and extent of proliferation of such pests, balancing the need for eradication and control with private property interests and environmental concerns, is a source of increasing tension. Just as the year was ending, bovine spongiform encephalopathy (BSE) was identified in a Washington dairy cow. The state Department of Agriculture assumed a key supporting role for the U.S. Department of Agriculture (USDA), the lead investigative agency, in addressing this issue of national and international concern. The division assisted and advised the state Department of Agriculture and coordinated the legal response with the USDA's attorneys in the Justice Department.

The Department of Health and the Department of Agriculture are key agencies in assisting the Governor in counter-terrorism preparedness, which has evolved into emergency preparedness for a variety of events, including SARS and BSE. The division anticipates continuing involvement in assisting these agencies in preparation and response for agricultural and health emergency events.

The division's work for the Department of Community, Trade and Economic Development (CTED) in this last year included an increase in litigation activity in growth management; increased work in the area of international trade, advising the Governor's Advisor for Trade Policy; and increased work with the Office of Archeology and Historic Preservation involving preservation of tribal remains and artifacts.

"Rising health care costs, particularly for prescription drugs, and greater difficulty in accessing health care have garnered increasing attention from both the Department of Health and the Health Care Authority."

Significant Cases and Their Impact

Malbrain and Terrell v. State: This litigation arose out of the efforts of the Department of Agriculture to prevent the establishment of the Citrus Longhorned Beetle (CLHB) in Western Washington. The CLHB, an invasive pest which destroys many types of trees, arrived in Washington in a shipment of bonsai trees at a nursery in south King County. Upon the advice of a scientific panel, the department sought permission from neighboring property owners to remove the types of trees on their property, which would serve as hosts for the proliferation of the CLHB. Most of the affected property owners consented to the tree removal. The plaintiffs, consisting of three property owners who did not consent, wanted to be compensated in advance of the tree removal, arguing that the removal of the trees constituted a "takings"

Agriculture and Health Division

- under the Washington and U.S. Constitutions. The Superior Court held that an emergency existed, supporting the Governor's emergency order to remove the trees, but the court also held that the tree removal constituted a "taking" for which compensation was owed in advance of the tree removal. The Department of Agriculture appealed the ruling of the King County Superior Court. Oral argument was conducted before the Court of Appeals this year and a decision is pending.
- **Ongom v. Department of Health:** The Department of Health took action against the registration of a nursing assistant based upon findings that she abused a patient. The findings were supported by a preponderance of the evidence, but not by a clear and convincing standard of proof. In *Nguyen v. Medical Quality Assurance Commission*, the Washington Supreme Court held that the state must meet the clear and convincing standard of proof to take action against a physician's license. Subsequent to that decision, the Courts of Appeal have issued decisions holding that the preponderance of the evidence standard is sufficient for taking action against a real estate appraiser's license *Eidson v. Department of Licensing*, and requiring the clear and convincing standard of proof in action against an engineer's license *Nims v. Board of Registration for Engineers and Land Surveyors*. Alice Ongom appealed to the King County Superior Court, which affirmed the department's application of the preponderance of the evidence standard to take action against her license. She has now appealed to the Court of Appeals.
- **Supporters of the Center v. Department of Labor and Industries** The Supporters of the Center (SOC), a non-profit organization, received a "pass through" grant of \$3.7 million from CTED to construct the Wenatchee Performing Arts Center. After the project was substantially completed, L&I determined that the project was constructed "at the cost of the state" and that the SOC should have paid the workers prevailing wages. The SOC filed a petition for judicial review of L&I's decision and also brought an action for a declaratory judgment against CTED for the value of any prevailing wages due under RCW 39.12.042. The Thurston County Superior Court ruled that the project was not a public work and dismissed the action against CTED. L&I appealed the ruling and, in December, the Court of Appeals ruled that the project was a public work for which prevailing wages should have been paid. SOC has petitioned the state Supreme Court, requesting the court to accept review of the Court of Appeal's decision.
- **Multicare Health System v. Department of Health:** Multicare Health System, which operates two hospitals in Tacoma, wanted to build a new facility in south King County. The Department of Health ruled the proposal must be reviewed to determine whether a "certificate of need" should be issued. Multicare appealed, claiming the new facility could be operated under its existing license to operate the two hospitals in Tacoma, and obtained direct review in the Court of Appeals. The department prevailed at the Court of Appeals and Multicare has asked the Supreme Court to grant discretionary review.
- **Mader v. State:** Part-time community college employees filed a class action in King County Superior Court against the Board of Community and Technical Colleges, the Department of Retirement Systems and the Health

Agriculture and Health Division

Care Authority. With respect to the Health Care Authority, plaintiffs alleged entitlement to continued health care benefits during periods when they are not teaching. At the superior court, the agency was affirmed in part and reversed in part. The faculty members appealed the superior court decision and the state filed a cross appeal for discretionary review. The Court of Appeals held the plaintiffs were not entitled to continued health care benefits when they were not teaching. The Supreme Court reversed the Court of Appeals and remanded this matter to the Superior Court for clarification of the class certification.

Major Issues/Events

Counter-Terrorism and Emergency Preparedness: Since the fall of 2001, the division has assisted the Department of Health in the preparation of several counter-terrorism and emergency preparedness and response plans. These include the bioterrorism plan, smallpox pre-event and post-event plans, and the SARS plan. Assistance and advice are also being provided on a number of legal issues arising in this area, including the preparation of templates to implement quarantine and isolation, consistent with state law and procedures.

WSDA Food Safety: When bovine spongiform encephalopathy (BSE) was identified in a Washington dairy cow by the United State Department of Agriculture (USDA) in late December, the Washington Department of Agriculture was immediately called in to assist the USDA in investigating and addressing this national and international concern. The division is assisting the state Department of Agriculture on a variety of legal issues as they support the USDA in responding to this high profile agricultural and health concern.

West Nile Virus: As summer waned in 2002, the West Nile Virus was identified in dead birds and two horses in this state. Based on these findings, the Department of Health (DOH) expected the first human cases of West Nile Virus in 2003. The division assisted DOH in preparing for those initial cases. A West Nile Virus response plan was prepared, working with county governments. The virus continued its march westward in 2003, hitting the state of Colorado particularly hard; however, Washington was reprieved. This reprieve is not expected to last through the 2004 mosquito season. Our division is continuing to work with DOH in preparation for the first human cases in Washington.

"When bovine spongiform encephalopathy (BSE) was identified in a Washington dairy cow by the United State Department of Agriculture (USDA) in late December, the Washington Department of Agriculture was immediately called in to assist the USDA in investigating and addressing this national and international concern."

Ecology Division

"The Department of Ecology has dramatically increased its investment in the processing of water rights applications with an attendant increase in litigation involving water rights decisions."

● Summary of Responsibilities

- The Ecology Division represents the Department of Ecology, Puget Sound Action Team, Pollution Liability Insurance Agency, and the State Conservation Commission.

● Legal Services Provided

- The Ecology Division, which is located in Olympia, consists of 23 attorneys, 2 paralegals and 15 professional staff. The division works to resolve environmental problems and disputes using a variety of legal tools including negotiation, multi-party mediation, and litigation when necessary. Division attorneys provide advice on a broad spectrum of matters, including permitting, legislation, rule-making, and enforcement. The division's practice includes hearings before administrative boards as well as trials and appeals before state and federal courts.

● Numbers/Trends

- The largest area of the division's workload is in the area of water allocation and management. The Department of Ecology has dramatically increased its investment in the processing of water rights applications with an attendant increase in litigation involving water rights decisions. In addition, division work to assist Ecology in oversight of the U.S. Department of Energy's (USDOE's) cleanup of the radioactive waste at Hanford has also intensified as the result of USDOE's recent efforts to accelerate cleanup decisions. Other areas of significant workload include supporting the Department of Ecology with the cleanup of contaminated sites, stormwater regulation, regulation of hydroelectric dams, negotiation of new shorelines guidelines, and the permitting of major economic development projects such as the Sea-Tac Airport Third Runway Project.

- **Water Resources:** Cases in this area include defending permit decisions, rules, and enforcement actions as well as prosecuting general stream adjudications. The division continues to work closely with the Governor's Office and the Department of Ecology in the development and implementation of a judicial and legislative strategy to reform the state's system of water resource management. The division worked in conjunction with the department to complete a report on Streamlining Adjudications. Further, the division is assisting the Attorney General who is leading a Water Disputes Task Force in its study of judicial and administrative alternatives for resolving

Ecology Division

water rights disputes. In the area of litigation, which drives the majority of the division's workload in the water resources area, division attorneys are currently litigating issues of enforcement, tribal water rights, municipal water rights, the licensing of groundwater withdrawals, and a significant number of cases involving the change or transfer of existing water rights. In the state's longest running general adjudication, *Acquavella*, the division will continue with efforts to use mediation to significantly narrow the issues remaining to be litigated.

Water Quality: The division's water quality practice involves a significant amount of work providing advice on permit actions, and defending challenges to Ecology's permit decisions. There are significant numbers of enforcement actions such as orders and penalties that are subject to administrative hearings and judicial review. The division is also advising the Department of Ecology regarding its efforts to address non-point source pollution and its implementation of the Total Maximum Daily Load (TMDL) requirements of the federal Clean Water Act. A significant component of work in this area is associated with advising and defending the department's decisions regarding the regulation of stormwater discharges, the adoption of new statewide water quality standards, and the renewal of a significant number of pulp and paper mills discharge permits.

Hazardous Waste Management and Cleanup: In this area of the division's practice, assistant attorneys general negotiate and enforce consent decrees and orders requiring cleanup of sites contaminated with hazardous substances. The division also defends Department of Ecology permit decisions and enforcement actions against facilities that generate, treat or dispose of hazardous wastes in order to prevent the creation of more contaminated sites. The division continues to look for opportunities to promote "brownfields development" through the use of innovative agreements that allow purchasers of contaminated property to resolve liability concerns, thus freeing up the properties for development. Significant areas of work include advising and defending Ecology as it develops new regulatory approaches for handling emerging problems such as the closure of major hazardous waste treatment, storage and disposal facilities, and the widespread contamination of arsenic and lead resulting from lead smelters and the past application of lead arsenate to fruit orchards. In addition, the division is also assisting the department in its efforts to ensure cleanup at federal facilities. Finally, division work in the bankruptcy courts has increased as businesses with environmental cleanup obligations seek bankruptcy protection.

Shorelines: Division attorneys are involved with resolving Shoreline Management Act disputes at all levels of administrative and judicial review. The primary cases handled in the Ecology Division in this subject matter area are Shoreline Hearings Board appeals of department actions regarding local government shoreline permit decisions. Significant work in this area over the past year included representation of the department and Attorney General in a mediated settlement of long-running litigation over new Shoreline Management Act guidelines. As a consequence of the new shoreline guidelines, a significant component of future work will focus on rule

"The division also defends Department of Ecology permit decisions and enforcement actions against facilities that generate, treat or dispose of hazardous wastes in order to prevent the creation of more contaminated sites."

Ecology Division

- proposal and adoption and then development, review and appeals focused on the updating of shoreline master programs across the state.

- **Spill Prevention Program:** The Olympic Pipeline Explosion and gasoline spill required work on the natural resources damages assessment and restoration, where Ecology, along with other trustees, has worked with the liable parties. The department issued two of the largest penalties in state history (\$7.86 million) against Olympic Pipeline and Equilon Pipeline Company for the 236,000 gallon spill and explosion that killed three people. Collection of this penalty has required significant legal involvement because of a pending bankruptcy action by the Olympic Pipeline Company. In addition to the Olympic Pipeline work, the division attorneys represent Ecology in numerous enforcement actions taken by the spill prevention program, and in development of rules governing the contingency plans for oil handling facilities in Washington.

- **Air Quality:** In this area, the division defends Department of Ecology permit decisions and enforcement actions. The department is currently implementing a program requiring issuance of complex, facility-wide air operating permits that continue to generate additional workload for the Ecology Division both in requests for advice as well as defenses of permit decisions. The department continues to actively enforce its regulations relating to agricultural burning through the issuance of enforcement orders, which are often appealed. In addition to defending against these appeals, the division is currently defending the department's grass-burning regulation against a challenge associated with one of the enforcement cases. The division also represented the department in reaching a tentative settlement of litigation filed by a company claiming damages related to its contract with the state to perform emissions testing. Finally, the division is currently representing Washington in multi-state climate change-related litigation challenging EPA's decision that carbon dioxide is not a pollutant under the Clean Air Act.

- **Environmental Bankruptcy:** Washington played a leadership role in several major bankruptcy proceedings in which the debtors attempted to abandon contaminated property or transfer the property free and clear of significant environmental liabilities. Our aim in each of these proceedings was to avoid creating "orphan" sites, and to ensure that that satisfaction of environmental liabilities is a condition of any protection granted by the bankruptcy courts.

- **Other:** Division attorneys also work in a number of other areas including the regulation of water well drillers, solid waste management, environmental review of significant projects under the state Environmental Policy Act, and oil spill prevention and cleanup. The area of hydroelectric dam regulation has been an increasing focus of the division and the work has extended beyond Washington cases to coordinating national efforts to combat efforts by the federal government to impede state authority. Similarly, the office has been a leader in a national effort by state attorneys general resisting efforts by the federal government to reduce state authority over the environmental impacts of military bases.

Ecology Division

Significant Cases and Issues

Olympic Pipeline: The division worked with Ecology and the federal government to finalize agreements with Equilon/Shell Pipeline and Olympic in which the companies agreed to pay a total of \$7.5 million in penalties to the state for the pipeline explosion in Bellingham as part of a global state/federal criminal and civil settlement. Ecology agreements are crafted to allow amendment so that environmental projects in the Bellingham area are implemented instead of cash payments. Equilon/Shell made \$5 million payments in December 2003 to fund a city of Bellingham restoration trust fund and a Whatcom Land Trust Project.

Hanford: The state prevailed in a lawsuit filed to prohibit the U.S. Department of Energy (DOE) from shipping a form of radioactive waste known as transuranic waste to Hanford for disposal from other DOE sites around the country. The federal court granted the state's motion for a preliminary injunction based upon its claim under the National Environmental Policy Act.

On another Hanford matter, Washington joined other states with DOE sites in an amicus brief supporting a successful challenge to DOE's regulations allowing it to reclassify high-level radioactive waste. The court held that DOE's regulations exceeded its authority under the Nuclear Waste Policy Act.

United States and Lummi Nation v. Ecology: In this ongoing lawsuit, the federal district court ruled against the state on two significant legal issues raised in summary judgment motions. First, the court ruled as a matter of law that there is a federal reserved right to groundwater which extends to the case area within the Lummi Reservation. Second, the court ruled that there were genuine issues of material fact concerning whether agriculture was a primary purpose of the reservation, so the court did not rule on summary judgment whether the reserved right should be quantified by the practicably irrigable acreage standard. A trial in this case is set for October 2004.

Methow Valley Irrigation District v. Ecology (MVID): In this case, the PCHB upheld a Department of Ecology administrative order requiring the Methow Valley Irrigation District (MVID) to limit its water diversions from the Methow and Twisp Rivers. The ruling supported Ecology's finding that MVID's conveyance system is wasteful and that much more water is diverted than is needed for irrigation and conveyance. Further, this ruling verified Ecology's authority under the water code to limit water diversions when water is being wasted.

SeaTac Third Runway: This case involves challenges to the Department of Ecology's decision to issue a Clean Water Act Section 401 water quality certification of a federal permit authorizing the construction of a third runway at Seatac Airport. This year, in this long-running case, division employees argued before the State Supreme Court in its review of the PCHB's ruling upholding Ecology's certification and adding new conditions. In related

"The state prevailed in a lawsuit filed to prohibit the U.S. Department of Energy (DOE) from shipping a form of radioactive waste known as transuranic waste to Hanford for disposal from other DOE sites around the country."

Ecology Division

- litigation, the Federal District Court issued a ruling against the opponents of the third runway dismissing their challenge to the U.S. Army Corps of Engineers 404 “dredge and fill” permit. In doing so, the court rejected arguments, joined by Washington as amicus, that the Corps was required to adopt conditions imposed by the PCHB.
- Global Warming Suit by States:** Washington joined a number of other states in challenging a decision by the U.S. Environmental Protection Agency that carbon dioxide is not a “pollutant” under the Clean Air Act. Resolution of this issue is a prerequisite to filing another planned lawsuit requiring EPA to update its New Source Performance Standard for power plants to include regulation of carbon dioxide emissions.

Fish, Wildlife, and Parks Division



Summary of Responsibility

The Fish, Wildlife, and Parks Division represents the Washington Department of Fish and Wildlife (WDFW) and the State Parks and Recreation Commission in legal matters before state and federal courts and administrative tribunals. In addition, the division advises the client agencies in civil and criminal matters, assists local prosecutors, and provides general information to the public concerning natural resources issues.

Legal Services Provided

The division provides litigation and advice services regarding fish and wildlife resource management, habitat protection, tribal issues, rule adoption, public disclosure, hydropower licenses, law enforcement, land acquisition and management, public works construction, endangered species issues, water rights, and contracts. Litigation may involve State Environmental Protection Act, Shoreline Management Act and Growth Management Act cases, appeals of licensing actions, hydraulic project approvals and forest practice permits.

Numbers/Trends

The Endangered Species Act (ESA) has been the source of a growing workload for client agencies and the division. The division counsels and represents WDFW in settings related to the protection and recovery of terrestrial and aquatic species that have been listed or are candidates for listing under the ESA. Additionally, citizen initiatives on wildlife management and challenges to them have become increasingly frequent. Tribal issues remain prevalent. Tribal hunting issues in particular, are arising with increasing frequency. Litigation, real estate issues, and cooperative agreements with non-profits are expected to increase for State Parks.

Significant Cases/Issues

United States v. Washington, Subproceeding 89-3 (shellfish): This subproceeding established that tribes may take up to half of the shellfish from most inter-tidal beaches (from both shellfish farms and private lands) and half of all deep water shellfish fisheries (crab, shrimp, and geoduck). An

"Litigation may involve State Environmental Protection Act, Shoreline Management Act and Growth Management Act cases, appeals of licensing actions, hydraulic project approvals and forest practice permits."

Fish, Wildlife, and Parks Division

"The division is advising WDFW regarding the complex and challenging legal issues that arise during the negotiations, including those involving the Endangered Species Act (ESA) and its relation to federal Indian law."

- Implementation Plan was ordered by the court setting forth equitable sharing principles, establishing an obligation to enter into management plans, and setting up dispute resolution procedures. The division continues to assist WDFW in developing and negotiating annual management and harvest agreements. Tribal harvesting from inter-tidal shellfish farming operations remains a challenge. Tribes are only allowed to harvest from lands with significant "natural" populations of shellfish. A dispute resolution proceeding is currently underway to ascertain the threshold density of shellfish needed to establish the existence of a "natural" bed of inter-tidal shellfish. The division is also representing the state with regard to the development of a potential consent decree and settlement that would have the Tribes forgo harvesting on commercial growing lands in exchange for the payment of money.
- **United States v. Washington, Subproceeding 01-1 (culverts):** In January 2001, 21 Indian Tribes and the federal government sued the state, alleging that the state violates the Tribes' treaty "right of taking fish" by owning culverts that block fish passage, to the extent that such culverts impair the Tribes' ability to earn a "moderate living" from fishing. The state's position is that its ongoing efforts to identify and repair defective culverts satisfy any treaty-imposed obligation to provide fish passage. The case has broad implications for land use and resources management in the Pacific Northwest. Since May 2002, the parties have been engaged in settlement negotiations.
- **United States v. Oregon:** Five Columbia River basin Treaty Tribes, three Columbia River basin states, and the federal government are negotiating a new fish management plan governing fisheries, as well as fish production measures, in the main stem of the Columbia River. The plan adopted in 1988 expired, but the parties have successfully negotiated interim agreements. The division is advising WDFW regarding the complex and challenging legal issues that arise during the negotiations, including those involving the Endangered Species Act (ESA) and its relation to federal Indian law. The agreement, once negotiated, will directly affect multi-million dollar fisheries on the Columbia River.
- **Initiatives 655 and 713:** Statewide hunting of cougar, bobcat, black bear, and lynx with hounds was eliminated by Initiative 655 in 1996. Initiative 713 enacted in 2000, bans use of body-gripping traps and two types of poison for killing animals. The division recently defended the two initiatives against a challenge alleging that both violate the Public Trust Doctrine. The plaintiffs alleged that I-655 and I-713 strip the Department of Fish and Wildlife of its management tools, causing the agency to lose control of the state's wildlife. Plaintiffs appealed the superior court's ruling upholding the validity of the initiatives directly to the State Supreme Court, which denied review. Appellate review is currently pending in Division II of the Court of Appeals.
- **Tribal Hunting:** In 2001, the division assisted WDFW in negotiating an unprecedented agreement with the four Medicine Creek Treaty Tribes regarding the establishment of a geographical line on which the state, Tribes, and county prosecutors could rely in enforcing state and tribal hunting

Fish, Wildlife, and Parks Division

regulations. WDFW subsequently adopted the enforcement line by rule. In 2002, the division successfully defended a challenge to the rule by the Cowlitz Tribe in Thurston County Superior Court. The division continues to provide WDFW with advice regarding the implementation of the 1999 Supreme Court decision in *State v. Buchanan* and issues regarding interpretation of the “open and unclaimed lands” language in the Stevens Treaty.

Hydropower Issues: The division represents WDFW in proceedings before the Federal Energy Regulatory Commission (FERC) and federal courts, concerning the licensing and re-licensing of hydropower dams in the state. These are lengthy and complex proceedings, involving high-stakes contests between the economics of electrical power generation and protection of fish and other wildlife resources jeopardized by the presence and operation of the facilities. Division workload has significantly increased in the last six months as many of the large hydro projects in Washington are reaching the end of their first Fifty-Year Lease and are in the process of applying for new licenses. The following major proceedings are representative of the work done by the division:

- **Condit:** This hydroelectric project is located on the White Salmon River. The parties to the relicensing proceeding, including the dam owner, federal and state agencies, the Yakama Indian Nation, and a coalition of environmental groups, joined in a settlement agreement that provided for removal of the dam. After submission to FERC, further environmental review was initiated. The licensee has now begun permitting and approval processes for removal of Condit Dam.
- **Cowlitz:** The division assisted WDFW in reaching a natural resources protection settlement agreement for licensing the hydroelectric facility. The agreement involved state and federal agencies, the Yakama Indian Nation, and included several environmental groups. FERC accepted the settlement agreement and issued a license. A Clean Water Act certification necessary for the license was appealed and the license was suspended pending the outcome of the appeal.
- **Box Canyon:** FERC has recently rejected one of WDFW’s recommended license terms and conditions for the protection of fish and wildlife. WDFW, along with the other parties, has again joined in negotiations to attempt to create an agreed settlement for natural resources protection measures.

Buchanan v. Locke, et al.: In September of 2003, the Buchanans sued the Washington State Parks & Recreation Commissioners and Director for allegedly violating their First Amendment rights after a nonprofit corporation that built a community playground at a state park denied their request to inscribe a donated brick with a religious message. After the nonprofit corporation voluntarily decided to permit the brick inscription, the state defendants filed a motion to dismiss based on mootness and failure to state a claim since state personnel were not involved in the original decision. A decision on the state’s motion is currently pending.

Natural Resources Division

"Approximately half of the cases resolved in 2003 involved constitutional challenges, issues of first impression, i.e. issues of law that have not been decided before, or programmatic issues that will affect an entire agency program or large segments of an industry or population."

● Summary of Responsibility

- The Natural Resources Division represents the Commissioner of Public Lands, Department of Natural Resources (DNR), Board of Natural Resources, Forest Practices Board, Board of Geographic Names, and other related committees.

● Legal Services Provided

- The division provides a broad spectrum of client advice, dispute resolution, and litigation services. DNR manages three million acres of state uplands, generating as much as \$300 million a year for trust beneficiaries, and also manages more than two million acres of aquatic lands. DNR also exercises
- extensive regulatory, environmental and fire protection responsibilities on 11.8 million acres of state and private forest lands, and administers
- several programs designed to purchase property interests to protect riparian areas.

● Numbers/Trends

- In 2003, the division received 61 new cases and handled 156 active cases during the year. The division resolved 51 cases, with a 97 percent success rate. While the overall number of cases has remained fairly constant, the complexity and significance of the cases continues to increase. Approximately
- half of the cases resolved in 2003 involved constitutional challenges, issues of first impression, i.e. issues of law that have not been decided before, or programmatic issues that will affect an entire agency program or large segments of an industry or population. Two years ago, only a third of the cases involved these types of issues.

- In addition to litigation, the division received 165 new formal requests for advice in 2003, and worked on 387 requests that were active during the year.
- The division also reviewed approximately 241 business documents. Division attorneys provided 12 training sessions to DNR staff, on issues ranging from the state ethics laws to real property issues and water rights.

- The division's workload has increased in several areas:

- - **Proprietary Forest Management Issues:** DNR is in the process of making a number of decisions about management of forest lands owned by the state and held in trust. Interest groups have become

Natural Resources Division

increasingly aware of and involved in DNR's forest land management activities. Given the current state budget crisis, the trust beneficiaries who receive revenue from state timber sales, such as universities, school districts, and counties, are also quite interested in DNR's forest land management decisions. The consequence has been an increased demand for client advice in this area as well as more litigation. The division is currently defending a programmatic challenge to the timber sales program in the court of appeals. The division is also assisting DNR with issues such as generation of a sustained yield calculation, development of a legislatively-mandated land management plan for the Lake Whatcom watershed, and implementation of the Endangered Species Act Habitat Conservation Plan for state lands.

"This year the division assisted DNR in negotiating a lease of state land for wind power generation — a first in Washington."

- **Proprietary Transactions:** DNR's transactions include monthly timber sales as well as purchases, sales, exchanges and leases of forest lands, commercial properties, agricultural lands, aquatic lands, and geoducks on aquatic lands. This year the division assisted DNR in negotiating a lease of state land for wind power generation — a first in Washington. These transactions often raise issues involving the Forest Practices Act, State Environmental Policy Act, Growth Management Act, hazardous waste laws, water rights and the Endangered Species Act. Legal challenges in this area are increasing slightly. DNR is attempting to expand its agricultural land holdings. Accordingly, the division is assisting with an increased number of complex water rights issues as well as SEPA issues.
- **Trespass and Ownership Issues:** The division is seeing an increase in the number of trespass cases DNR is asking the division to file. The situations involved range from expired leases where tenants refuse to re-sign a lease or to pay rent, to cases where property boundaries or ownership are in dispute. DNR is focusing its efforts on determining which rivers and streams throughout Washington State are navigable and thus owned by the state. Division attorneys are assisting in this endeavor.
- **Fire Cost Recovery:** DNR has a statutory right to collect its fire suppression costs when a third party's negligence is responsible for the starting or existence of a fire which spreads on certain forest land and under other enumerated circumstances. DNR decided to refocus its attention on fire cost recovery this year by placing a higher priority on the office's involvement and resurrecting a program that had languished for the past two years. As a result, the division has worked closely with key program personnel to establish a framework for the investigation of forest land fires and the processing of meritorious fire suppression claims. A division attorney and paralegal are pursuing three large fire suppression claims, each ranging from in excess of \$300,000 to \$1 million, with more claims expected to follow as the program is implemented.
- **Recreation and Access to State Land:** As private landowners continue to close their lands to the public, DNR faces increasing pressure to keep state lands available to the public for recreation.

Natural Resources Division

Indian tribes, as well, desire access to state lands for purposes of hunting and gathering of cultural resources. Division attorneys have responded to a number of requests for advice and increasing litigation surrounding issues related to access. Issues include: the ability to regulate the shooting of firearms, the regulation of off road vehicle usage, access for recreational gold prospecting, DNR enforcement authority generally, and issues concerning the recreational immunity statute. The division also assisted DNR in developing a legislative proposal to create a "legacy trust" to fund public access.

Significant Cases and Their Impact

Northwest Ecosystem Alliance v. FPB: This case involved a major challenge to the existing forest practices rules as well as a claim that the Forest Practices Board had improperly failed to adopt certain rules. The superior court dismissed the case, concluding that claims relating to the agency's alleged failure to update or amend rules needed to be raised with the Forest Practices Board before seeking judicial review. This year the division successfully argued this case before the Washington Supreme Court. In a unanimous decision, the court held that a party must first file a petition with the agency asking it to change its rules before seeking judicial review of a failure to adopt or amend rules.

State Owned Forests & Washington Environmental Council v. Sutherland: Several environmental groups filed a programmatic challenge to DNR's timber sales program. Plaintiffs allege that DNR is failing to adequately address the cumulative impacts of timber harvesting on state land under SEPA. They also challenge on similar grounds DNR's extension for three years of an existing forest resource plan that contains policies for the management of state forest land. A large number of school districts and counties intervened as defendants. Division attorneys were successful in getting one of the two claims in this case dismissed by the King County Superior Court. The issue of whether the challenge to the forest resource plan was timely filed and served is now pending before the Court of Appeals.

Pacific Sound Resources & Port of Seattle v. Burlington Northern Santa Fe Railway Corp., et al.: Pacific Sound Resources and the Port of Seattle joined DNR and the state as defendants in a contribution action under the Model Toxics Control Act (MTCA). Plaintiffs seek to recover their costs of cleaning up a Superfund site in King County (allegedly between \$20 and \$40 million) and a declaration that defendants are liable for future costs. The state owns some of the land within the site, and DNR has leased that land. This case involves issues of first impression concerning DNR and the state's liability under MTCA. The case is scheduled for trial in 2005.

Alpine Lakes Protection Society v. Forest Practices Board: Ten environmental groups filed a petition for rule making with the Forest Practices Board. They alleged that the state-wide rules governing timber harvesting and other forest practices failed to adequately address the cumulative environmental impacts of forest practices, and requested the board to

Natural Resources Division

adopt new rules. The Forest Practices Board denied the petition. In April 2003, the environmental groups filed a lawsuit in Thurston County Superior Court seeking judicial review of the Board's denial. The case is pending and involves a significant number of rules.

Washington Geoduck Harvest Association v. DNR: This case involves a challenge to the constitutionality of the statute that directs the Department of Natural Resources to sell geoducks. The association alleges the statute violates the public trust doctrine and equal protection guarantees in the Washington Constitution. The association contends that geoducks must be available to all citizens, at no charge. In recent years the state has received \$6 to \$10 million a year from the sale of geoducks. In September 2003 the Thurston County Superior Court upheld the constitutionality of the statute. The association filed an appeal with the Court of Appeals, Division II, which is pending.

Major Issues/Events

Federal Assurances: As part of the forest and fish process, the state is seeking from National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service an ESA section 10 incidental take statement and/or coverage under NMFS' 4(d) rule for activities conducted under the forest and fish rules adopted by the state Forest Practices Board. The state is also seeking assurances from EPA concerning the ability of the state rules to meet certain federal Clean Water Act requirements. Division attorneys have provided and will continue to provide significant legal advice to DNR and the Governor's Office during this process.

Protecting Public Funds



Revenue, Bankruptcy and Collections Division



Summary of Responsibility

The Revenue Unit of the Revenue, Bankruptcy and Collections Division provides legal services to the Department of Revenue (DOR), which administers and collects the state's major excise taxes. The unit also provides legal services related to the DOR's administration of the state's property tax system, its assessment of operating property owned by public utilities, and the DOR's administration of the state's unclaimed property law and the estate tax.

"The unit is currently handling approximately 160 cases addressing a wide variety of predominantly excise tax refund claims."

Legal Services Provided

The unit's principal legal activity involves defending the DOR against excise tax refund claims filed in the state courts and the Board of Tax Appeals. The unit also handles property and miscellaneous tax litigation and advises the DOR on tax and general governmental matters.

Numbers/Trends

The unit historically receives 40 to 70 new cases annually. In 2003, the unit received 49 cases. The unit is currently handling approximately 160 cases addressing a wide variety of predominantly excise tax refund claims. Many of these claims are of industry-wide significance. Additionally, there are approximately 45 cases related to out-of-state manufacturer issues. The unit also handled six appellate cases that were decided in 2003.

Significant Cases and Their Impact

Challenge to DOR Rule-Making Authority: In two cases, the Association of Washington Business has challenged the DOR's authority to promulgate interpretative administrative rules, arguing that the Legislature repealed that authority in regulatory reform legislation enacted in 1995.

Out-of-State Manufacturers: Also before the courts are a number of significant refund claims brought by out-of-state manufacturers and product suppliers to Washington manufacturers in which these taxpayers contend that the sales of such products, in fact, occur outside the state and thus are exempt from the business and occupation tax.

Revenue, Bankruptcy and Collections Division

"The Department of Energy's Office of Hearings and Appeals (OHA) entered a final order granting to the state of Washington a payment equal to taxes of approximately \$6.8 million."

- **Estate Tax:** A class action lawsuit challenges the administration of Washington's estate tax. The class plaintiffs assert that Washington's estate tax is "coupled" with the federal estate tax and that the significant changes to the federal estate tax Congress enacted in 2001 necessarily apply with respect to Washington's estate tax so as to reduce or eliminate the amount of estate taxes that must be paid to the state under the credit provisions of the federal estate tax. In December 2003, the Thurston County Superior Court held that the federal estate tax revisions did not affect the continuing vitality of Washington's estate tax. The plaintiff class is expected to seek review.
- **City of Tacoma v. Wm. Rogers Co., Inc.:** The Supreme Court issued a decision in favor of the City of Tacoma, holding that the city properly applied its B&O tax to a temporary staffing agency with respect to revenues the staffing agency received from its clients that were used to pay the wages of the employees it supplied to those clients. The Revenue Unit filed an amicus brief on behalf of the DOR supporting the city's position.
- **Washington Public Port's Association v. Department of Revenue:** The Supreme Court unanimously upheld the DOR's assessment of leasehold excise taxes against a public lessor, concluding that RCW 82.29A.050 unambiguously holds public lessors liable for collecting and remitting leasehold excise tax to the DOR. The court further concluded that requiring public lessors to remit the leasehold excise tax when they have failed to collect the tax from their lessees does not violate the state constitution.
- **AT&T Corp. and AT&T Communications of the Pacific Northwest v. Department of Revenue:** The plaintiffs in this action seek refunds of approximately \$56 million. They contend that their charges to Washington customers for international telephone service are not subject to the retail sales tax under RCW 82.04.065. The Thurston County Superior Court disagreed and granted summary judgment to the DOR. Plaintiffs have appealed.

Major Issues and Events

- **Payments Equal to Taxes:** The Department of Energy's Office of Hearings and Appeals (OHA) entered a final order granting to the state of Washington a payment equal to taxes of approximately \$6.8 million. OHA ordered the payment pursuant to the Nuclear Waste Policy Act of 1982 for site characteristic activities conducted at Hanford during the mid-1980s to determine Hanford's suitability as a possible nuclear waste repository. The Revenue Unit represented the state in the proceedings before OHA.
- **Implementation of Tobacco Settlement:** The Revenue Unit plays an important role in the implementation of the historic tobacco litigation settlement agreement. Working with the DOR, the unit enforces the "escrow" statute adopted by the Legislature that applies to cigarette manufacturers selling tobacco products within the state which have not joined the master settlement agreement. The amount that must be put into escrow is based

Revenue, Bankruptcy and Collections Division

on product sales each year and provides a source of accountability for compliance with state law. Diligent enforcement of the escrow statute also insulates the settlement payments received by the state under the master settlement agreement from being reduced based on the non-participating manufacturers' (NPM) adjustment. This adjustment applies if there is an increase in the NPMs' market share resulting from the implementation of the master settlement agreement.

The unit also worked this past year to obtain legislation to assist in such enforcement. The new law requires tobacco product manufacturers to certify to the Attorney General's Office prior to selling its cigarettes in this state. Tobacco manufacturers whose certifications have been approved can be found at www.atg.wa.gov/tobacco.

Streamlined Sales Tax Project: The unit also advised the DOR on the streamlined sales and use tax legislation enacted by the Legislature, which is intended to provide for a simpler and more uniform sales and use tax structure among states that have sales and use taxes, thereby making it easier to collect sales tax resulting from sales of goods into the state by national firms.

"Most of the money is owed for delinquent sales and business and occupation taxes, industrial insurance premiums and unemployment fund contributions."

Bankruptcy and Collections Unit

Summary of Responsibility

The Bankruptcy and Collections Unit (BCU) encourages voluntary compliance with the state's tax laws by supporting the efforts of state agencies to aggressively pursue money owed to the state. Most of the money is owed for delinquent sales and business and occupation taxes, industrial insurance premiums and unemployment fund contributions.

The BCU gives priority to representing the Departments of Revenue, Labor & Industries, and Employment Security in bankruptcy cases. Assistance has also been provided to other agencies including Agriculture, Community Trade & Economic Development, Corrections, Financial Institutions, Ecology, Health, Higher Education Coordinating Board, Licensing, Parks & Recreation, Natural Resources, Social & Health Services, State Investment Board, State Patrol, Transportation, University of Washington, Washington State University, Utilities & Transportation Commission and the AGO Consumer Protection Division.

Legal Services Provided

The vast majority of the BCU's work consists of handling bankruptcy litigation in cases under chapter 11 ("corporate reorganizations") and chapter 13

Revenue, Bankruptcy and Collections Division

"The BCU currently has 543 active cases with a total of \$17.8 million in agency claims."

- (cases involving regular income from small businesses or jobs) of the federal Bankruptcy Code. The BCU's attorneys provide legal services at all stages of a bankruptcy case. A typical case would include appearing early on behalf of the agency, obtaining all financial information necessary to analyze the agency's claims, asserting secured or trust fund status, if appropriate, and defending any challenges to agencies' claims. The BCU's attorneys review proposed bankruptcy plans to ensure proper treatment of agency claims, enforce payment when taxes or payments under court-approved plans are delinquent, and also review proposed sales to ensure that taxes are not avoided.

- Although highest priority is given to bankruptcy cases, the BCU handles a significant number of collection actions against the bonds of contractors who are delinquent in tax payments. The BCU also devotes substantial resources to training tax agency personnel who handle bankruptcy and collections claims.

Numbers/Trends

- A total of 11,856 bankruptcy and collections cases have been handled on behalf of the state since the BCU was created in 1993. The BCU has collected more than \$102 million, including \$68.3 million in payments made, \$11.6 million in claims successfully defended, and \$22.6 million in future payments to be made to the state under court orders. The BCU currently has 543 active cases with a total of \$17.8 million in agency claims.

Significant Cases and Their Impact

- **Taxation of Bankruptcy Sales:** The BCU brought a series of challenges to proposals by debtors seeking to exempt the sale of assets in bankruptcy from state taxation. Although the Bankruptcy Code exempts collection of a "stamp or similar tax" on the sale of property in a confirmed bankruptcy case, courts had expanded that exemption to real property sales occurring prior to confirmation of a plan and debtors sought to expand it to include sales and use tax assessed on personal property. The first significant challenge was in *GST/Time Warner Telecom*, with a partly favorable decision. With the appeal pending, the BCU filed an amicus brief in the Third Circuit in *In re Hechinger's*. After the court ruled in favor of the state's position, the debtor in *GST/Time Warner Telecom* paid DOR \$4.25 million to resolve the appeal. The BCU prevailed in several other districts on this issue, with recoveries exceeding \$500,000.

- **Tower Tristar:** Tower Tristar owned an apartment building, Tower@801, that was adjacent to the Convention Center. Tower Tristar claimed that the apartment building lost income and depreciated in value as a result of the expansion of the Convention Center. Tristar Tower sued the Convention Center as well as Kiewit, the Convention Center's general contractor, and

Revenue, Bankruptcy and Collections Division

Hedreen, a co-developer in the expansion project, claiming total damages of approximately \$20 million. Tower Tristar based its claim for damages primarily on the allegation that the expansion delayed the internal renovation of Tower@801 by reducing pedestrian traffic, making the renovated units difficult to rent. The delay in the renovation allegedly prevented Tower@801 from being sold before the real estate market collapsed. The case was successfully mediated and settled with the defendants paying the following: Convention Center \$470,000, Kiewit \$140,000 and Hedreen \$110,000. Kiewit also paid approximately half the Convention Center's costs and attorneys' fees based upon Kiewit's agreement with the Convention Center to provide insurance for the expansion project.

Torts Division

"The Torts Division prevails at trial in more than three out of four cases tried. However, verdicts in cases lost by the state have increased markedly due to nature of the injuries for which the state is now held liable."

● Summary of Responsibilities

- The Torts Division defends tort claims and lawsuits against all state agencies, officers and employees. The majority of cases are based on actions brought under theories of liability for state actions such as highway design, release of inmates, injuries on state property, medical malpractice, employment, child care and custody, auto accidents, false arrests and unreasonable force.
- Tort attorneys also provide legal and risk management advice to state agencies on tort matters. In addition, the division provides advice and assistance to other divisions of the office on matters of trial practice, case evaluations and investigations and trial team assistance in specialized litigation efforts, such as shellfish or regulatory takings.

● Legal Services Provided

- The primary legal service provided by the Torts Division is the resolution of damage claims against state agencies and employees. Many cases are resolved through successful pretrial motions, saving the state significant resources in research, discovery and investigations. Historically, the division resolves an average of 50 percent of cases with no payout of state funds.
- The remaining cases are evaluated for settlement after pre-trial discovery and investigation. If possible, cases are settled through direct negotiation, or mediated negotiation. Cases that cannot be settled, or are inappropriate for settlement due to lack of liability, are tried before juries. The Torts Division also handles all appeals resulting from those cases.

● Numbers/Trends

- The Torts Division is currently handling approximately 585 cases. In FY 2003, the complexity of cases rose dramatically. In 1991 only 22 complex lawsuits were filed. In 2003 there were over 75 complex cases filed against state agencies. Investigators handle approximately 250 pre-lawsuit claims for damages each year. The division resolved 53 percent of the cases with no payout of state funds in FY 2003. Forty-two percent were settled and the other five percent are tried before juries or arbitrated.
- The Torts Division prevails at trial in more than three out of four cases tried. However, verdicts in cases lost by the state have increased markedly due to nature of the injuries for which the state is now held liable. In FY 2002 the division tried 29 cases to verdict. There were 17 defense verdicts,

Torts Division

three hung juries and one mistrial. The remaining verdicts totaled \$1.5 million. Two of those cases are on appeal. In FY 2003, 17 cases were tried to verdict and 13 were defense verdicts. The remaining cases resulted in payouts of \$1.1 million.

The division created a Torts Appellate Program in 2001, which in FY 2003 handled 36 cases to resolution with a 92 percent win/loss ratio. Over the last five years, the division has averaged a win/loss ratio on appeal of 90 percent. The team is made up of a supervising attorney, two assistant attorneys general, three paralegals and professional staff. The team not only handles significant appeals but also consults on significant motions and jury instructions.

The division has seen large increases in employment cases and they now reflect 25 percent of the division's workload. Litigation against DSHS social workers and social service programs, particularly those dealing with children is another increasing caseload. These are areas of relatively new state liability, as recognized by the courts, and it is expected that litigation in these areas will continue to grow in volume, complexity and potential dollar exposure to the state. In the past several years, the court of appeals has issued four more decisions, which will increase DSHS liability for child protective activities.

In recent years, average total payouts to resolve tort cases generally ranged from \$5 million to \$30 million per year. In 2001 the amount took a sharp increase up to over \$80 million dollars as a result of a few large verdicts and payouts. In fiscal year 2002, the amount of tort payouts decreased back to previous levels at \$31 million. In fiscal year 2003 the payout was up to \$40 million in total payouts on all claims and lawsuits.

The division also provides advice, training and other cost saving assistance to agencies in the areas of risk prevention, planning and management.

"The division has seen large increases in employment cases and they now reflect 25 percent of the division's workload."

Significant Cases and Their Impact

Couch v Department of Corrections: Yoshiko Couch was tragically murdered by an offender on supervision by the Department of Corrections (DOC) for the repayment of financial fees to the court and restitution. The Couch family sued the DOC for failing to prevent the murder under the theory that supervision for repayment of financial obligations also included the duty to control the offender's future criminal behavior. The appellate court held that there is no duty to control the behavior of an offender who is only being supervised so that financial obligations are repaid. The court's ruling dismissed a trial verdict of nearly \$15 million dollars and the state ultimately was relieved from any obligation to pay.

Torts Division

"DSHS, with legal assistance from this office, handles thousands of these dependency cases every year."

Major Issues/Events

Wrongful Adoption Cases: Several years ago there were approximately 15 "wrongful adoption" cases pending against DSHS and its caseworkers. The claim was that caseworkers were negligent in not fully disclosing psychological or emotional problems of children before adoption. The parents generally sought damages for their emotional distress in raising the children and large damages for care and treatment of adopted children. Many of the lawsuits alleged that the children had Fetal Alcohol Syndrome. The state has settled some of these cases and some have been dismissed. The state won two others at trial, one of which was appealed to the state Supreme Court. The court affirmed the defense verdict in favor of the state. However, the court, unlike courts in most other states, did generally approve the legal basis for filing this kind of lawsuit against the state and adoption agencies. More of these lawsuits are now being filed and some are going to trial.

Dependency Cases: State law provides that DSHS can obtain a court order allowing temporary foster care for children who are suspected of being victims of abuse or neglect. DSHS, with legal assistance from this office, handles thousands of these dependency cases every year. In some cases, the courts ultimately decide to remove children from their parents permanently or for extended periods of time. However, in many cases children are returned to their parents after investigation or professional examination reveals that abuse likely did not occur. In the past it has always been thought that the state had no liability for obtaining temporary court orders to protect children. Recently, however, the courts have ruled that parents can sue and argue that the state "negligently investigated" the allegations of abuse or neglect which lead to the court order for temporary foster care.

Juries have been awarding hundreds of thousands of dollars in these cases. This is a major legal development because there are hundreds of cases every year in which the state might now be sued for placing children in protective foster care.

Early Resolution Program: The Torts Division has initiated an early resolution program. The goal of the program is to try to achieve savings by early negotiation of lawsuits and claims arising from incidents for which the state is likely to be held liable if the matter goes to court.

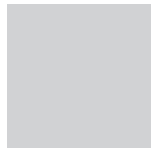
"Parole" Liability Cases: In 1992, the state Supreme Court held that the DOC could be liable for crimes committed by released offenders who were under state post-release "supervision." This has produced a huge increase in payout. In 1997, there was a large (\$6.5 million) verdict against the state in one of these cases, and in 1998 the state Supreme Court reaffirmed its decision allowing this liability and extended the liability to local government "probation" supervision. As a result of these developments there has been a large increase in lawsuits against the state by victims of crimes by released offenders under state supervision. The state now has almost three dozen lawsuits and claims pending against it for murder, rape, and other serious crimes by released offenders. Many of these suits represent multi-million dollar loss exposures for the state. One case led to a verdict of nearly \$23 million and is on appeal to the Supreme Court of Washington State. The

Torts Division

plaintiff in that case is alleging that the DOC is liable for future crimes of offenders even if their previous crimes were of a completely different nature. The Supreme Court is likely to decide this matter in 2004.

Strengthening Washington's Education System

Education Division



Summary of Responsibility

The Education Division provides a full range of legal services to more than 50 education-related clients, including: three regional universities; The Evergreen State College; 28 community colleges; five technical colleges; and other education-related boards, such as the Higher Education Coordinating Board, the State Board for Community and Technical Colleges, the Council of Presidents and the Center for Information Services. In addition, the division serves the Office of the Superintendent of Public Instruction, nine area-wide educational service districts, the State Board of Education, the Academic Achievement and Accountability Commission, and the Professional Educator Standards Board.

The division has nine attorneys located in offices in Olympia and Seattle. It also coordinates the work of 14 attorneys in the regional offices who do legal work, either full or part-time for educational institutions in the vicinity of those offices.

Legal Services Provided

The workload of the division is extremely diverse. On any given day, division attorneys advise on matters as varied as constitutional rights, labor/management disputes, employee rights, student rights and responsibilities, discrimination and sexual harassment, public contracting, intellectual property, and general public sector business issues. Attorneys also represent their education clients at hearings on a variety of education-related matters, including prosecution of teacher misconduct, consumer complaints against private vocational schools, labor arbitrations, and employee and student misconduct hearings. In serving the Higher Education Coordinating Board, the State Board for Community and Technical Colleges, and the Superintendent of Public Instruction, the division handles a wide variety of legal issues associated with both the K-12 and higher education systems, taking into account many federal as well as state laws.

"On any given day, division attorneys advise on matters as varied as constitutional rights, labor/management disputes, employee rights, student rights and responsibilities, discrimination and sexual harassment, public contracting, intellectual property, and general public sector business issues."

Numbers/Trends

The workload of the division has substantially increased during the current biennium. Enrollment at the regional universities, The Evergreen State College, and the community and technical colleges has increased significantly. Attorneys devote about 30 percent or more of their time to hearings and litigation involving administrative hearings, arbitrations, and

Education Division

"The division assisted the Solicitor General Team in preparing for U.S. Supreme Court arguments in Joshua Davey v. Locke in December 2003."

cases before the U.S. District Court, Superior Court, Court of Appeals and the state Supreme Court.

Significant Cases and Their Impact

Initiative 732: In December 2002, the Supreme Court held that Initiative 732 clearly intended to include locally-funded employees in cost-of-living increases. In a follow-on suit, *Brown and WEA v. State*, the plaintiffs challenge the Legislature's decision to fund two Learning Improvement Days instead of three, alleging a violation of I-732; article II, section 19 ("single subject" rule); and the state's constitutional "basic education" obligation.

Class Action Challenges to College Administrative Practices: There have been several lawsuits challenging personnel and administrative practices by the State Board for Community and Technical Colleges, the Department of Retirement Systems, or the Health Care Authority involving part-time community and technical college faculty. Two class actions alleging violations of wage and hour and overtime laws were successfully defended. A third class action for unpaid retirement benefits under the TIAA/CREF program was settled when the 2002 Legislature appropriated \$12 million to settle plaintiffs' claims and the settlement received court approval. In a companion case, part-time faculty is also seeking state-paid health care benefits during summer quarter. The case has been stayed by agreement of the parties pending settlement evaluation and negotiations.

Washington State Schools for the Deaf and Blind: Teachers at the Washington State School for the Deaf and the Washington State School for the Blind have filed a class action under unpaid wage statutes contending that the schools' salary practices did not conform to those offered by the local Vancouver School District, as required by state law, insofar as the schools do not pay supplemental salaries for additional time, responsibilities, or as an incentive (or "TRI" payments). The Thurston County Superior Court has not yet set a trial date.

Church and State: The division assisted the Solicitor General Team in preparing for U.S. Supreme Court arguments in *Joshua Davey v. Locke* in December 2003.

Major Issues/Events

Because client agencies are dealing with reduced budgets, the division's workload has increased to assist them to cope with budget-related issues. Regionalization of services has allowed clients easier physical access to their attorneys which results in many matters being resolved before they involve litigation. It also requires close coordination among the attorneys in order to maintain consistent advice.

University of Washington Division



Summary of Responsibility

The University of Washington Division provides legal services to the University of Washington in Seattle, with campuses in Bothell and Tacoma. The university currently has over 39,000 enrolled students. It is one of the largest employers in King County, with about 22,000 staff and 6,500 teaching and research faculty. The university operates two hospitals, University of Washington Medical Center and Harborview Medical Center.

"There are 111 active lawsuits and 24 active administrative cases involving the university and its affiliated hospitals and officials."

Legal Services Provided

The university has all the legal issues of a large state agency, many of the legal issues of a large corporation, and many legal issues unique to higher education. Accordingly, the division must provide a broad spectrum of legal advice and representation, including employment law, labor relations, student affairs, real estate, land use, environmental, intercollegiate athletics, public finance and bonding, contracts, intellectual property, tax, employee benefits, constitutional law, gifts and trusts, and health care law. In addition, the division coordinates with assistant attorneys general representing the other colleges and universities in the state. The division also works with attorneys from the Torts Division and with special assistant attorneys general handling specialized cases.

Numbers/Trends

There are 111 active lawsuits and 24 active administrative cases involving the university and its affiliated hospitals and officials. About half of the lawsuits are medical malpractice cases. The remaining cases involve disputes on construction projects, claims of statutory violations, personal injuries, and employment issues, among others.

The following trends have increased demand for legal advice and representation:

- The UW's medical centers, like all other health care providers, are heavily regulated and closely monitored by federal and state agencies concerning Medicare and Medicaid billing, patient privacy, research practices, and other subjects. Both the medical centers and the division are devoting greatly increased resources to ensuring compliance and responding to regulatory inquiries.
- Enhanced collective bargaining rights for large segments of university employees have recently been added to the already complex web of federal, state, and local laws governing employment. Statutes and

University of Washington Division

"The university's leadership role in scientific and technical research, computing and communications development, and other high technology has significantly increased requests for advice on intellectual property issues."

regulations concerning harassment, retaliation, and other forms of discrimination continue to grow and require legal counseling.

- Increased enrollment and federally-funded research continues to create pressure for growth on and off the university's main Seattle campus. The division has worked closely with the university in negotiations, and sometimes litigation, with community groups, in seeking permits for various projects, in drafting contracts with other governments and businesses, and in planning and contracting for various facilities.
- The university's leadership role in scientific and technical research, computing and communications development, and other high technology has significantly increased requests for advice on intellectual property issues. These include copyright, licensing of technology, and access to computer-based information.

Significant Cases and Legal Issues

Labor Relations: The 2002 session of the state Legislature authorized teaching assistants to engage in collective bargaining. The university is currently in hearings before the Public Employment Relations Commission (PERC) to determine which student appointments are eligible to be in this bargaining unit. That decision will then set the stage for allowing the employees to select a union if they wish to. There is also new legislation authorizing faculty to unionize and collectively bargain. No union has currently been formed, but there are early signs that some employees are interested. Additionally, the university will be bargaining separately under the new legislation for state classified staff wage bargaining.

Technology and Intellectual Property: The university receives significant revenue by selling licenses to outside companies to use technology and intellectual property developed through the university's research activities. The university is also involved in using the Internet as a means of providing educational services. With the expansion of the university's licensing and "distance learning" services, the division handles a large volume of legal issues regarding interpretation and enforcement of licenses, constitutional questions including First Amendment and privacy concerns, and patent, trademark, and copyright law.

Presidential Search: Following the November 15, 2002, resignation of President Richard McCormick, a search committee was formed to find and hire a new university president. The university has called on this office to ensure the search committee and the Board of Regents have been adequately informed about the intricacies of the Open Public Meetings Act. While an active search continues, the Board of Regents voted to appoint former Provost Lee Huntsman as university president. Mr. Huntsman has agreed to stay in the administration for two years through the search and transition to a new university president.

Washington State University Division



Summary of Responsibility

The Washington State University Division provides legal services to the state's land grant university from the main campus in Pullman. The division's five attorneys, with support from attorneys in other divisions in specialized areas such as employment and construction law, provide legal services to the main campus, the three branch campuses (in Spokane, the Tri-Cities, and Vancouver), agricultural research and extension operations statewide, and extension field offices in every county.

"Division attorneys provide advice on a host of legal issues, many of which are unique to an academic environment."

Legal Services Provided

Division attorneys provide advice on a host of legal issues, many of which are unique to an academic environment. Attorneys frequently provide advice on issues relating to: the university's research efforts, including its research agreements with the federal government and/or private sponsors, faculty research, and faculty ownership and use of intellectual property; the university's statewide Cooperative Extension Program (including 4-H programs); athletics and NCAA compliance; various student rights and programs; state residency for tuition purposes; all aspects of personnel/employment law, including faculty tenure and promotion; university development; environmental health and safety; public contracting; constitutional rights; veterinary training and services; and capital planning and development, as well as operation of facilities. Division attorneys also provide representation on non-tort related litigation in a variety of forums.

Numbers/Trends

Division workload continues to grow as the university continues to grow and expand its branch campus programs and its research efforts. Almost 22,000 students currently are enrolled at the main campus in Pullman and branch campuses in Spokane, the Tri-Cities, and Vancouver. Washington State University employs approximately 6,900 individuals, including personnel located at research stations, county extension offices, and learning centers. The university is nationally recognized for its research in areas ranging from biotechnology and computer design to wood product use and agricultural marketing, and its research efforts are growing. During the past year, the university obtained more than \$117 million in external research funding, an increase of more than \$13 million over the previous year (\$29 million over the last 2 years).

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Protecting the Public

Criminal Justice Division

"The division investigates and prosecutes Medicaid fraud and resident abuse, environmental violations, and tax fraud cases on behalf of the state."

● Summary of Responsibility

- The mission of the Criminal Justice Division (CJD) is to work with and support its partners in the criminal justice community, and to work towards creating safe communities. The Criminal Justice Division staff represents and advises the Department of Corrections (DOC), Indeterminate Sentence Review Board (ISRB), Washington State Patrol, Governor's Clemency and Pardons Board, the Governor's Office on extraditions and detainers, and the Criminal Justice Training Commission. The division investigates and prosecutes Medicaid fraud and resident abuse, environmental violations, and tax fraud cases on behalf of the state. The CJD civilly commits previously convicted sexually violent predators who have served their criminal sentence and who still pose a serious threat to reoffend and responds to all federal habeas corpus petitions that result from state felony convictions, including capital cases. Upon request from the Governor, local law enforcement and local prosecutors, the division investigates and prosecutes criminal cases throughout the state and provides investigative and prosecutorial support to local law enforcement and prosecutors in computer and high tech related crime. The CJD provides state and nationwide investigative expertise and assistance through the office's Homicide Investigation Tracking System (HITS) Unit, and through the investigators and crime analysts who are part of HITS.

- The CJD also serves several other criminal justice clients. Among these are the Jail Industries Board, State Toxicology Lab, Sentencing Guidelines Commission, and State Forensic Investigation Council. Finally, the CJD represents the state in reimbursement claims that result from self-defense acquittal claims.

● Legal Services Provided

- **Corrections/Civil Rights Unit:** The Corrections/Civil Rights Unit represents DOC and its employees in state and federal court litigation. Actions handled by this unit often involve inmate constitutional rights claims associated with conditions of confinement, access to courts, freedom of speech, or due process of law and personal restraint petitions filed by inmates challenging administrative or disciplinary action taken against them by DOC. This unit also provides advice and training for DOC in many areas including search and seizure, access to courts and public disclosure. Attorneys in this unit also review draft DOC policies and contracts for constitutional and legal issues and represent DOC in some parole revocation proceedings before the ISRB.

Criminal Justice Division

Sentencing/Habeas Corpus Unit: This unit represents the state and the DOC in challenges to the fact or duration of confinement resulting from a state court felony conviction. A key responsibility of this unit is to handle the continued prosecution of death penalty cases and other convictions in federal court. Unit staff represents DOC in post sentence petitions, which involve correcting errors in criminal judgments and sentences. They also represent the ISRB in challenges to its discretionary decisions relating to release of offenders under its jurisdiction. Finally, the unit advises the Governor's Office on clemency and pardon matters and on interstate extradition matters.

Medicaid Fraud Control Unit (MFCU): The MFCU is a federally mandated and funded investigative and prosecutorial unit staffed by attorneys, auditors, investigators, and support personnel. The function of the unit is to investigate and prosecute both fraud by health care providers that illegally divert Medicaid funds and the criminal abuse and neglect of residents in Medicaid funded facilities. The unit provides valuable assistance to local law enforcement in investigating and prosecuting crimes committed against vulnerable adults. The unit trains cadets at the Basic Law Enforcement Academy, other investigative agencies, and helps to coordinate the efforts of local vulnerable adult task forces whose missions are to improve the response to crimes committed against this population. The unit works closely with the Washington State Medicaid program integrity team. The Payment Review Program within the Department of Social and Health Services employs powerful computer software to analyze billing patterns of all Medicaid providers and routinely discovers billing irregularities which result in substantial repayments to Medicaid.

The 1999 reconfiguration of the MFCU to emphasize Resident Abuse has led to many improvements in the response to criminal resident abuse and neglect in Medicaid-funded facilities. The establishment of the Vulnerable Adult Contact Network has fostered more timely and more meaningful responses from local law enforcement when complaints about vulnerable adult abuse and neglect are reported.

Sexually Violent Predator Unit (SVP): The SVP Unit was established in 1990 following enactment of RCW 71.09 which permits the involuntary civil commitment of sex offenders who, because of a mental abnormality and/or personality disorder, are likely to commit predatory acts of sexual violence if released to the community.

The unit is responsible for prosecuting sex predator cases for 38 of Washington's 39 counties (King County being the exception). The expertise of the unit permits it to handle all aspects of sex predator cases, including pre-filing investigations, pre-trial motion practice, trial, post-commitment proceedings and appeals. Attorneys appear before both state and federal courts. The unit also employs two investigators who work with the attorneys and paralegals to identify and locate witnesses and otherwise prepare cases for filing and trial.

Homicide Investigation Tracking System Unit (HITS): HITS is a program within the Attorney General's Office that tracks, investigates and

"The expertise of the unit permits it to handle all aspects of sex predator cases, including pre-filing investigations, pre-trial motion practice, trial, post-commitment proceedings and appeals."

Criminal Justice Division

- maintains a searchable database of homicides, rapes and other violent crimes. It is the only statewide central repository for information relating to violent crimes. Investigators have collected data from more than 7,700 murder investigations, more than 7,000 sexual assaults, as well as other major crime data. Investigators utilize HITS to assist local law enforcement in the investigation of violent crimes. HITS is also a national leader in developing and using computers in innovative ways to prevent crimes and increase the solvability of crimes. It has been the recipient of several grants to study trends or common characteristics in violent crimes, and provides training to local law enforcement.

- **Criminal Litigation Unit (CLU):** When requested by the Governor, county prosecuting attorneys or the Organized Crime Intelligence Unit of the Washington State Patrol, the CLU investigates, assists with and prosecutes complex criminal cases. These types of cases include multi-county crime, white-collar crime, governmental corruption or cases where the local prosecuting attorney has a conflict of interest. This unit may also assume responsibility for the appellate review of a criminal case originally brought by a county prosecutor if that case involves fundamental issues affecting the public interest and the administration of justice. Operating as part of the CLU are the Environmental Crimes Unit, Financial Crimes Unit and High Tech Unit.

- The Environmental Crimes Unit investigates and prosecutes significant criminal violations of our state and federal environmental statutes. This is accomplished in conjunction with a joint criminal investigation task force comprised of investigators and agents from the state Department of Ecology and the U. S. Environmental Protection Agency.

- The Financial Crimes Unit is funded by the Washington Department of Revenue (DOR), which refers cases from its Audit and Compliance Division. These cases generally involve the statewide investigation and prosecution of tax fraud cases as well as false statement and theft crimes committed against the state. The unit also assists state agencies in the areas of fraud detection and training.

- The High Tech Unit was created in 1999 to assist local law enforcement and county prosecuting attorneys in their efforts to respond to complaints of computer-related crime and to educate and promote the protection of the citizens and institutions of the state of Washington from the use of computers, technology and the Internet for criminal enterprises. Through the creation of this unit, the Attorney General's Office has acquired expertise in the investigation and prosecution of Internet and computer crimes and has developed the ability to conduct limited forensics computer work.

Numbers/Trends

- **Corrections Unit and Sentencing/Habeas Corpus Unit:** In 2003, the DOC's "in custody" population reached over 16,450 inmates. These inmates are housed in DOC's 13 prisons and 18 pre-release and work-release facilities.

Criminal Justice Division

In addition, DOC has over 94,000 offenders subject to its jurisdiction. In 2003 there were approximately 784 new cases opened on the combined dockets of the Corrections and Sentencing Units: 195 habeas corpus cases (of which 86 were appeals); 108 civil rights cases (of which 29 were appeals) in federal court; 12 civil rights cases in state superior courts; 290 personal restraint petitions; 5 parole revocation hearings; 111 post sentence petitions; 12 public disclosure cases; 17 self-defense reimbursement cases; and 18 miscellaneous cases. Approximately 698 cases were closed during the same time period. Increases in the offender population are expected to continue to drive increases in the demand for legal services.

In 1999, the state Legislature enacted the Offender Accountability Act (OAA), a new approach to sentencing and post incarceration supervision that places responsibility for conducting most community custody violation hearings with the DOC, rather than the courts. As this new law is tested, this too will have a significant impact on the demand for legal services.

Ten individuals are currently under sentence of death in the state of Washington, and there are several cases either under prosecution at the state trial court level or at the investigation level pending a decision whether to seek the death penalty. The unit has an expanded role in assisting local jurisdictions in defending capital sentences at the state direct appeal and personal restraint petition stages. These potential new cases, together with the three active death penalty cases currently being handled by the division, may strongly influence the future workload of the division.

Medicaid Fraud Control Unit: The MFCU concluded a number of fraud and resident abuse investigations with the filing of charges, and the referral of cases to county prosecutors for their review and action. The unit, with its federal partners, concluded fraud cases resulting in approximately \$1 million in restitution, investigative costs, fines and overpayments being ordered. At any given time during the year, the unit had approximately 175 fraud and resident abuse cases under active investigation.

The Resident Abuse Section staff played a leadership role in improving the way that resident abuse and criminal neglect complaints are processed. The Resident Abuse Section received 183 complaints of crimes committed against vulnerable adults. More than half of those cases were investigated by RAS investigators, resulting in the filing of eight criminal cases statewide.

Criminal Litigation Unit: In 2003, 27 cases were referred to the CLU for prosecution and approximately 40 cases were referred for prosecutorial assistance at the trial or appellate court level. The unit also spent approximately 350 hours rendering informal assistance on criminal prosecution and complex criminal litigation matters.

Representation of the Criminal Justice Training Commission increased in 2003 when amendments to RCW 43.101 became operative and included sections requiring peace officer certification as a condition of employment. The CLU represents CJTC in denial of certification and de-certification matters. In 2003 the Unit received 11 cases for review. The attorneys representing the CJTC publish the Law Enforcement Digest, an important source of criminal

"Ten individuals are currently under sentence of death in the state of Washington, and there are several cases either under prosecution at the state trial court level or at the investigation level pending a decision whether to seek the death penalty."

Criminal Justice Division

"As a result of the work of the Financial Crimes Unit this year, five cases were filed for a total of 36 felony counts."

- case law for police officers in this state. They also received 234 requests for assistance related to CJTC (an increase of 35 percent from last year).
- Representation of the Washington State Patrol by the CLU attorneys has fielded 269 request for client advice, reviewed 60 contracts, represented the client on 20 subpoenas and/or motions, handled 25 requests relating to public disclosure issues, addressed 27 matters dealing with "Constitutionalists," and handled 99 calls relating to the WSP from outside that agency.
- As a result of the work of the Financial Crimes Unit this year, five cases were filed for a total of 36 felony counts. Restitution of \$146,961 has been ordered in two of these cases, and an additional agreed restitution amount of \$148,647 is pending sentencing, for a total of \$295,608. Two trials are presently pending on cases filed in 2003, and the restitution in those two cases is calculated to be \$314,138, before penalties and interest.
- The High Tech Unit continues to refine the role it seeks to play in the criminal justice arena. The HTU has been very active in internet training for law enforcement, parents and children. The HTU has received 24 requests for general assistance and 26 requests for training during 2003.
- **Sexually Violent Predator Unit:** Washington was the first state to enact a sexually violent predator law to protect citizens from predatory sex offenders. Since 1990, many other states have used Washington's sex predator law as a model in enacting similar statutes. The unit has been able to provide assistance to these other states because of its vast experience dealing with sexually violent predators.
- Approximately 55 cases were referred to the unit in 2003 to determine whether to initiate a sexually violent predator action seeking the civil commitment of those persons. This past year, the unit filed 20 such actions; obtained commitments in 12 cases and had one acquittal; and handled 64 Annual Review Proceedings. Six individuals were released to Less Restrictive Alternatives in 2003.
- **Homicide Investigative Tracking System Unit:** The HITS database currently contains information from 7,722 murder files, 7,045 sexual assault files and 54,029 pieces of data from other major crimes.
- The demands on HITS continued to increase in 2003. HITS received 627 Requests for Information (increase of 57 percent) from law enforcement agencies. The requests included name searches, case comparisons, analysis/profiling, verification of informant information, resource information, and vehicle searches. 156 Bulletins (increase of 6 percent) were distributed to 2,037 locations in Washington, Oregon and British Columbia. HITS investigators were actively involved in providing assistance in:
 - **D.C. Sniper Case:** The FBI requested that HITS do a data run looking for any unsolved firearm deaths. This was done and compared to the FBI's timeline on the two sniper suspects. Agencies that had cases that were possibly connected were contacted and referred to the FBI for their follow-up.

Criminal Justice Division

- **Robert Yates Signature Analysis:** Robert Yates was arrested in Spokane in April 2000 for the serial murders of 12 prostitutes. He was later charged with the murders of two prostitutes in Pierce County. The Pierce County Sheriff's Office and Pierce County Prosecutor's Office requested that HITS do a signature analysis of all the cases. Analysis was done to show that the killings were part of a series that only Robert Yates could have done.
- **Gary Ridgeway/Green River Killings:** Responded to several inquiries from the Green River Task Force for information from the HITS database that was utilized to confirm and/or deny information obtained in the later stages of this investigation.
- **Triple Homicide, Raymond, Pacific County:** Providing direct investigative assistance in this investigation, including the development of a timeline of critical dates and researching information for the prosecution.

The unit also sponsored the following training in 2003: Basic Investigations Course at CJTC; Basic Homicide Investigation Course; Advanced Homicide Investigation Course; and DNA/Cold Case Development.

Significant Cases and Their Impact

Medicaid Fraud Control Unit

This year the Washington State MFCU took a leadership role in investigating, prosecuting and/or negotiating the multi-state settlements of four national cases:

- Nichols Laboratory is a clinical laboratory case from the early 1990's Labscam project. The fraud scheme involved the billing of unnecessary blood tests by Nichols. The total settlement was \$9 million. Washington State's recovery was \$164,000.
- Columbia/HCA is the largest hospital chain in the country. The case partially settled with 33 participating states and the federal government of \$840 million and criminal pleas by the defendant. Washington State's share was \$71,000. This litigation is continuing.
- Bayer Corporation is a drug manufacturer who settled with 50 participating states for \$14 million. The fraud scheme involved providing false prices for its drugs to a national reporting service relied upon by the various states' Medicaid programs. The difference between the real price and the false price referred to as the "spread" was the basis of damages. Washington State recovered \$235,000. This litigation is continuing and involves 15 other major drug manufacturers.

Criminal Justice Division

"The MFCU aggressively pursued a number of home health providers funded by the Medicaid programs."

- Tap, Inc., is a drug manufacturer which pleaded guilty to federal crimes involving inappropriate marketing techniques which resulted in substantial damages to the various Medicaid programs. The total settlement was \$875 million. The Washington State recovery is \$785,000.
- *State v. Carter, State v. Carlson-Magill, State v. Adams, State v. Jennings, State v. Richey, State v. Williams-Batchelder, State v. Astor-Vargas, State v. Honaker, State v. Kilmer*: The MFCU aggressively pursued a number of home health providers funded by the Medicaid programs. In each of the above cases, the MFCU investigated and successfully prosecuted individuals who billed for services never performed for homebound Medicaid recipients. A collective total in excess of \$38,000 in restitution was ordered by the various sentencing courts, and each of the defendants has been excluded from participating in any federally funded health care program.

Criminal Litigation Unit

- **State v. Garrett**: The CLU assumed responsibility for this Aggravated First Degree Murder, two counts of Burglary in the First Degree, and Unlawful Possession of a Firearm case from Chelan County because the murder weapon was stolen from a deputy prosecutor's office. The defendant murdered a video-store clerk in a robbery and pled guilty to life without parole or release.

- **State v. Newton**: The defendant is charged with Assault in the First Degree for the stabbing and mutilation of his mother. The case was referred to the CLU to avoid potential conflicts of interest.

- **State v. Michelle Knotek, State v. David Knotek**: The CLU agreed to act as co-counsel in these Pacific County triple murder cases. Trials are currently set for March and May 2004.

- **Tacoma Police Investigation (Brame/Woodard)**: In the wake of Tacoma Police Chief David Brame's murder of his wife and his immediate suicide, the CLU was requested by the Pierce County Prosecutor to assist in the investigation of the Tacoma Police Department and prosecute any criminal cases that arose from the investigation. Ultimately, no criminal charges were warranted, but several recommendations to correct deficiencies in the department were made after the six month long investigation.

- **State v. Grass**: This Garfield, Washington police officer was convicted of criminal trespass for searching a residence, while on duty, without a warrant.

- **State v. Stein**: The CLU represents the state in this complex retrial of a murder defendant. After eight continuances at the request of the defense, the trial is now set for late January 2004.

Criminal Justice Division

Corrections/Civil Rights Unit

In re Personal Restraint of Leland: Leland filed a personal restraint petition challenging a prison disciplinary infraction he received after he tested positive for ingestion of marijuana. He argued that his prison disciplinary hearing did not afford him all of the due process to which he was entitled. In response, DOC ordered a rehearing in order to address the purported due process violations. The court held that DOC does not have jurisdiction over a prison disciplinary hearing once an inmate files a personal restraint petition and, therefore, could not conduct a rehearing. This ruling conflicts with the decision of another division of the Washington State Court of Appeals. As a result of the split between the courts, the issue is on review in the Washington State Supreme Court in *In re Personal Restraint of Higgins*.

Washington Water Jet Workers Association v. Yarbrough, et al.: In this case, the plaintiffs challenged the constitutionality of the DOC's statutorily authorized Class I Free Venture Industries program. In a 5-4 decision, the Washington State Supreme Court affirmed the trial court's dismissal of this case. The court held that RCW 72.09.100(1), the statutory authority for the program, is not unconstitutional under Article II, Section 29, which prohibits the contract system of convict labor, not the private, voluntary employment of prisoners. Subsequently, the Washington State Supreme Court ordered a rehearing, argument was taken, and the matter is once again pending before the court.

Prison Legal News v. Lehman: This case involved a challenge to DOC's mail rejection of an issue of the publication *Prison Legal News* containing an article labeling certain DOC staff members as racists. Both the Federal District Court and the Ninth Circuit determined that DOC's decision was rationally related to a legitimate penological goal and dismissed the case.

In re Forbis: In this personal restraint petition, Forbis challenged DOC's authority to impose mandatory anger/stress management classes as part of inmate programming. Forbis argued that DOC did not have authority to require him to take anger/stress management because there was no such requirement in his judgment and sentence. He also challenged the requirement on ex post facto grounds. The Court of Appeals ruled in favor of Forbis. On appeal, the Washington State Supreme Court ruled unanimously in favor of the DOC finding that DOC has long had the authority to impose mandatory anger/stress management classes as part of inmate programming.

Hallett v. Payne: This class action lawsuit was brought in 1993 by inmates of the Washington State Corrections Center for Women (WCCW). The plaintiffs alleged that the medical and dental services at WCCW were constitutionally inadequate. The parties entered into a stipulation and judgment that was to expire in 1999. Since 1999 the parties have been litigating issues surrounding plaintiffs' efforts to extend the stipulation and judgment. In October 2003, the parties reached a settlement agreement which, if approved by the court, will result in the final resolution of a case that has been actively litigated for the last ten years.

Criminal Justice Division

- **Younger v. Lehman, et al. and Pitre v. Bon, et al:** In these two civil rights cases, pro se inmates alleged that their First Amendment right to freedom of religion was violated when their requests for kosher diets were denied. These cases were resolved by agreement of the parties.

Sentencing/Habeas Corpus Unit

- **In re Roach:** In this case the Washington Supreme Court concluded, as a matter of equity and state law, that DOC prisoners who are erroneously released from confinement may be entitled to credit for their time at liberty.
- **In re Forbis:** In this case the Washington Supreme Court held that a DOC policy requiring certain prisoners, on the verge of losing earned release credits, to attend stress/anger management classes was not an ex post facto law even if the prisoner's crime pre-dated the DOC policy.
- **Hutchinson v. Morgan:** On November 6, 2003, the federal district court denied Darrin Hutchinson's petition for writ of habeas corpus attacking his 1989 Island County conviction for two counts of aggravated first degree murder for murdering the Island County Deputy Sheriff. [This is the federal court proceeding following the Washington Supreme Court's denial of Hutchinson's PRP in 2002, which this office also handled. The court granted Hutchinson a certificate of appealability, however, so the case is not yet final.]
- **Lambert v. Blodgett:** In this case the federal district court granted Lambert a writ of habeas corpus, vacating his Grant County conviction for one count of aggravated first degree murder. The court concluded that Lambert (who was 15 at the time of his crime and 16 at the time of his guilty plea) received ineffective assistance of counsel and that his guilty plea was involuntary. The district court's decision has been appealed to the Ninth Circuit.
- **Brown v. Morgan:** In this capital habeas corpus proceeding, the federal court conducted a two-day evidentiary hearing in November 2003, concerning Cal Brown's claim that he received ineffective assistance of counsel at his King County capital trial in 1993.
- **Sanders v. Ryder:** In this case a panel of the Ninth Circuit concluded that the petitioner had exhausted his state remedies under 28 USC section 2254(b) even though the petitioner had failed to clearly present his claim to the Washington Supreme Court as a violation of the federal Constitution. Certiorari review in the U.S Supreme Court is being sought.

Government Compliance & Enforcement Division



Summary of Responsibility

The Government Compliance and Enforcement Division provides legal advice to the State Auditor, the Insurance Commissioner, Department of Financial Institutions, the Gambling Commission, the Horse Racing Commission, the Human Rights Commission, the Office of Minority and Women's Business Enterprises and the Joint Legislative Audit and Review Committee. It also handles the enforcement and forfeiture litigation for the Washington State Patrol, Public Disclosure Commission, Gambling Commission, State Lottery, Liquor Control Board, Department of Financial Institutions, Human Rights Commission, Horse Racing Commission, State Executive Ethics Board and Legislative Ethics Board. The division is responsible for the professional licensing litigation for the Department of Health. Finally, the division acts as the statutory Counsel for the Environment.

"The Enforcement/Forfeiture section prosecutes cases at the administrative level and on appeal of violations of campaign, discrimination, minority contracting, banking and securities, liquor, gambling, lottery, cigarette tax, and ethics laws."

Legal Services Provided

The division's 23 attorneys and 16 professional support staff provide a wide range of legal services to their clients. The division is divided into three sections.

The Advice and Compliance section provides legal advice on general issues affecting government agencies such as administrative law, federal preemption of state laws and regulations, investments, contracts, finance, public records, and ethics in government service. It also provides two elected officials with a wide range of advice regarding issues that are uniquely within the scope of their constitutional and statutory responsibilities. Attorneys for the Insurance Commissioner handle enforcement proceedings, rate hearings, insolvency proceedings, public disclosure requests and health care litigation. Attorneys for the Auditor's Office provide advice on legal compliance issues related to state and local government financial audits and state whistleblower investigations, monitor recovery efforts when fraud is reported, and handle enforcement action that may arise from the audit process. Two attorneys from the section also are appointed as members of the State Records Committee and Local Records Committee, respectively, which are charged with approval of public record retention schedules establishing how long public records must be retained prior to destruction.

The Enforcement/Forfeiture section prosecutes cases at the administrative level and on appeal of violations of campaign, discrimination, minority contracting, banking and securities, liquor, gambling, lottery, cigarette tax, and ethics laws. The section also handles Indian Gaming Compact advice and litigation, drug seizure litigation, and RICO/money laundering cases.

Government Compliance & Enforcement Division

"The Executive Ethics Board had one of the most dramatic increases of all the clients represented by the division."

- Finally, section attorneys act as the Counsel for the Environment on all matters related to the siting of energy facilities.

- The Health Licensing section prosecutes health care providers for allegations of misconduct and violations of the Uniform Disciplinary Act.

Numbers/Trends

- **Liquor Control Board:** In 2003, 107 cases were opened involving violations of state liquor and cigarette laws. The majority of the cases involved over-service of alcohol and sale of alcohol or cigarettes to minors. A few cases also involved the seizure of unstamped cigarettes and vehicles transporting these cigarettes. The number of actions handled by this division showed a slight decrease from the 140 cases handled in 2002.

- **Gambling Commission:** The division handled 51 new gambling citation cases in 2003. This is a slight increase from 47 cases last year. The division anticipates that the number of authorized gambling establishments will rise in the year 2004, bringing an increase in the number of enforcement actions it handles on behalf of the commission staff.

- **Public Disclosure Commission:** The division saw an increase to 130 matters opened in 2003 on behalf of the commission. Thirty-two of the cases were enforcement based, 13 were advice based and 85 outstanding penalties were submitted to the Attorney General's Office for collection. In the year 2003, the division worked actively with commission staff to reduce outstanding fines to court judgments, which were then returned to the commission staff for collection by appropriate agencies.

- **Executive Ethics Board:** The Executive Ethics Board had one of the most dramatic increases of all the clients represented by the division. In 2001, the board received 99 complaints, which led to 89 cases being investigated and resolved. In 2002, the board received 87 complaints, which led to 73 cases being investigated and resolved. In 2003, the division opened 160 advice files and for the first time in a number of years took a case to hearing.

- **Insurance Commissioner:** In 2003, the division opened 14 new matters for enforcement against agents, brokers and insurers. The division also advised the agency on the legal sufficiency of many other enforcement matters.

- **State Auditor:** In 2002, the division provided legal advice to the Auditor's Office on 56 whistleblower investigations involving 83 assertions of improper governmental action, 45 of which were substantiated. The division also received and monitored 14 cases involving reported audit findings of fraud in state and local government. Additionally, significant attorney time was devoted to resolving a wide variety of legal compliance issues that arose during legal/financial compliance audits of state and local government agencies, minimizing the resources necessary to follow-up and enforce audit findings. As a result, there was only one enforcement case arising from audit findings.

Government Compliance & Enforcement Division

Washington State Patrol: The division opened 89 matters for the State Patrol in 2003, ranging from client advice to vehicle impound challenges to terminal audits to drug forfeiture actions. More than \$145,000 in cash, real property and vehicles was forfeited as a direct result of drug forfeiture actions by the state.

Human Rights Commission: The division opened and handled 23 cases for the commission. More than \$93,000 in monetary damages and penalties were awarded to victims of discrimination and the state of Washington by way of administrative hearings with the commission.

Department of Health: The division attorneys opened approximately 345 matters on behalf of the department's boards and commissions. This shows a continuing increase (almost 10 percent) in these prosecutions from last year. In addition to the increase in cases, the complexity and length of time to try cases also increased dramatically as parties engaged in more active pre-hearing discovery and litigation than in past years.

Department of Financial Institutions: Consistent with last year, nine new cases were opened on behalf of the department, taking enforcement action against individuals and companies who violated the state financial laws, including securities, banking, mortgage lenders and consumer lenders. The division also handled a public records action on behalf of the department.

Horse Racing Commission: The division handled 14 enforcement matters for the commission this year against trainers, jockeys and other racing participants. The staff also handled the surrender of the racing license for the Playfair facility in Spokane.

Lottery Commission: The division handled seven challenges to lottery games in 2003. This was a decrease from the previous year's 19 challenges.

"More than \$93,000 in monetary damages and penalties were awarded to victims of discrimination and the state of Washington by way of administrative hearings with the commission."

Significant Cases and Their Impact

Campaign Laws

Washington Education Association v. Public Disclosure Commission: This case arose from an enforcement proceeding initiated against the Washington Education Association for its failure to properly comply with the state campaign laws by failing to obtain proper authorization from non-union members prior to using their nonmember fees for political purposes. In 2001, the Thurston County Superior Court awarded a \$400,000 penalty against the WEA for these failures and assessed an additional \$190,000 in attorneys fees and costs. On appeal, the Court of Appeals for Division II, in Washington, determined that the law under which the penalty was assessed (RCW 42.17.760) was unconstitutional and overturned the lower court's determination. The state has appealed the case, and it should be resolved by the Washington Supreme Court in 2004.

Government Compliance & Enforcement Division

State Auditor

Seattle v. Sonntag: This case arose from an audit, supported by AGO 2001 No. 1, regarding the city of Seattle's lack of authority to shift the burden of public street lighting costs from general taxation to electric rates charged to customers of its electric utility. The trial court ruled cities lacked authority to include public street lighting costs in electric utility rates, and that imposition of such costs in electric utility rates constituted a tax. Seattle appealed and simultaneously obtained a statutory amendment arguably authorizing inclusion of public street lighting costs in electric utility rates. Subsequently, the Auditor's Office declined to further pursue the case. However, a citizen intervenor sought court clarification on the effect of the statutory amendment. The Supreme Court held on November 13, 2003, that operation and maintenance of a city street lighting system is a governmental function as opposed to a proprietary function of government, that the charge imposed by Seattle on its electric utility rate payers is a tax rather than a fee, and that the tax was not lawfully imposed. Effectively, this case stands for the proposition that a city cannot shift the costs of general government to utility rate payers through increased fees. Rather, such charges are taxes that can only be lawfully imposed as a tax.

Insurance Commissioner

Premera Blue Cross: The Premera Blue Cross organization has petitioned the Insurance Commissioner for permission to convert from non-profit to for-profit status. Division staff will provide legal advice to the Insurance Commissioner during the conversion proceedings. In addition, separate division staff will provide advice and representation to the Commission staff responsible for reviewing and presenting evidence at the hearing on the application. The hearing is currently scheduled to be completed by April 9, 2004 with a Commissioner decision by June 9, 2004.

Major Issues/Events

Energy Siting Projects: The Counsel for the Environment (CFE) is appointed by the Attorney General for energy facility applications filed under the jurisdiction of the Energy Facility Site Evaluation Council (EFSEC). The role of the CFE is to represent "the public and its interest in protecting the quality of the environment." Currently, the CFE is involved in several energy facility siting determinations pending before the EFSEC. These proposals include BP's Cherry Point project located near Ferndale in Whatcom County and two wind generation facilities in Kittitas County, namely, Kittitas Valley Wind Power Project and Wildhorse Wind Power Partner Project.

World Trade Organization - Internet Gambling Complaint: The two-island, Caribbean nation-state of Antigua and Barbuda, an independent country that is a member of the British Commonwealth, has filed a legal challenge with the World Trade Organization seeking to invalidate all of the gambling laws (specifically Chapter 9.46 RCW) of the state of Washington, the United States, and all other U.S. states, territories and possessions. Antigua

Government Compliance & Enforcement Division

is home to a number of internet gambling operations that make a sizeable contribution to that nation's economy and its tax base. Antigua claims that our laws prohibiting, licensing and regulating gambling, and specifically internet gambling, violate the country's commitments under the GATS (General Agreement on Trade in Services) Treaty by restricting Antigua's "right" to provide internet gambling "services" to Washington residents. Division staff represents the Washington State Gambling Commission and the Washington State Trade Representative and is working with the U.S. Department of State and the Office of the U.S. Trade Representative in defending this challenge. A three judge panel (from India, Thailand and the UK) has been convened to hear the case and a briefing schedule has been set. Antigua's opening brief has just been received and the U.S. brief is due on October 29, 2004. The first hearing before the panel is scheduled for November 18-20, 2004, in Geneva, Switzerland.

Government Operations Division

"The division's 15 attorneys and eight professional staff provide a wide range of legal services to their clients, including defense of multi-million dollar class-action lawsuits, construction litigation, advice on complex real estate transactions, financing and bonding issues, state investments, anti-terrorism efforts and emergency management."

● Summary of Responsibility

- The Government Operations Division handles the litigation for, and provides legal advice to 39 state agencies and elected officials. These include the departments of General Administration, Retirement Systems, Military and Emergency Management, Information Services, and Personnel, the Washington State Senate and House of Representatives, the Office of the State Treasurer, the State Investment Board, the Public Employment Relations Commission, the Lottery, the Energy Facility Site Evaluation Council (EFSEC), certain divisions and programs of the Office of Secretary of State and other departments that provide services to government agencies or employees. In addition, the division provides representation to numerous boards and commissions including the Arts Commission, Historical Society, Interagency Commission for Outdoor Recreation and the Commissions on African American, Asian Pacific American and Hispanic Affairs.

● Legal Services Provided

- The division's 15 attorneys and eight professional staff provide a wide range of legal services to their clients, including defense of multi-million dollar class-action lawsuits, construction litigation, advice on complex real estate transactions, financing and bonding issues, state investments, anti-terrorism efforts and emergency management. In addition, the members of the division provide client advice and handle litigation on a myriad of other issues such as contracts, computer hardware acquisition, software licensing, the siting of major energy facilities, the purchase of goods and services for government agencies, labor law, employee benefits, state employment and National Guard matters. Attorneys in this division are actively involved in providing coordination and advice to all AGO divisions on contract law issues, real estate matters, construction claims, prevailing wage and e-commerce issues.

● Numbers/Trends

- The Department of Retirement Systems has the highest concentration of complex litigation, including the successful defense of several class action lawsuits with significant appellate victories in the last year. The division's workload changed after the September 11 attacks, and those changes due to new Homeland Security and emergency preparedness issues involving the state are expected to continue. The volume of work relating to debt financing for the State Finance Committee and the Office of the State

Government Operations Division

Treasurer has continued to be steady due to favorable market conditions and new programs. There has also been a significant amount of legal work associated with the permitting of proposed energy facilities.

Significant Cases and Major Issues

Anti-Terrorism

Military Department and Emergency Management: Since September 11 attorneys in the division have been coordinating with other members of the AGO to provide uniform advice on disaster planning, National Guard deployment, and the state's response to potential terrorist activity. As nationwide efforts on Homeland Security develop, division attorneys are working on a broad variety of security and preparedness response issues.

State Labor Laws and Civil Service Reform

Department of Personnel and Office of State Procurement: In 2002, the Legislature enacted the Personnel System Reform Act, which called for sweeping changes to the state's civil service system that will be completed by July 2005. Major aspects of this enterprise are (1) a complete revamping of the merit system and its rules (2) collective bargaining over wages, hours and benefits as well as working conditions, (3) contracting out of services "traditionally and historically provided by state employees," with the ability for employees to form business units and compete for certain types of contracted work, and (4) replacement of the state's human resources and payroll system to accommodate these changes, now known as the Human Resources Management System (HRMS).

Division attorneys are advising the Departments of Personnel and General Administration on a range of complex issues arising from the contracting out provisions and the enormous changes to the civil service structure and are coordinating advice that touches on collective bargaining with the Labor and Personnel Division. Our attorneys also participated in planning and conducting negotiations for two HRMS contracts totaling about \$40 million, handled related public records requests and litigation, assisted DOP in resolving a protest action filed by a disappointed bidder, and are providing legal guidance on HRMS implementation.

Retirement

LEOFF Plan 2 Retirement System Board: Pursuant to initiative I-790 approved by voters in 2002, a new retirement system board started operations in July 2003. The state has not had a retirement system board for more than 20 years. Division attorneys continue to work with the new board on set up, authority issues, and numerous other legal questions.

"Division attorneys are advising the Departments of Personnel and General Administration on a range of complex issues arising from the contracting out provisions and the enormous changes to the civil service structure and are coordinating advice that touches on collective bargaining with the Labor and Personnel Division."

Labor and Industries Division



Summary of Responsibility

Industrial Insurance: A major responsibility of the Department of Labor and Industries (L&I) is the administration of the Worker's Compensation Act. The act is designed to ensure that injured workers are provided comprehensive benefits and services in a cost-effective manner. Under the act, L&I serves as the trustee and administrator of the \$4 billion workers' compensation trust fund which consists of premiums paid by workers and employers. L&I's Employer Services section has established a comprehensive program for assessing and collecting insurance premiums. L&I also maintains programs to prosecute individuals who fraudulently collect workers' compensation benefits and to prosecute medical and vocational providers who commit fraud.

A crime victims' compensation program compensates innocent victims of criminal acts. L&I administers the claims and pays benefits to those who qualify.

Regulatory Functions: The Washington Industrial Safety and Health Act (WISHA) requires L&I to administer a workplace health and safety program. Washington is one of 23 states which, rather than submitting to direct federal regulation in this area, administers a state-run Occupational Safety and Health Plan subject to federal oversight.

L&I's Employment Standards program enforces wage and hour laws, regulates apprenticeship training, and monitors whether companies bidding on public works have complied with prevailing wage laws.

The Specialty Compliance Services division handles a variety of regulatory and enforcement functions including boiler inspections, electrical inspections, regulation of factory assembled housing, elevator inspections and contractor registration.

"Although most of these claims are administered and resolved within L&I, more than 700 disputed claims per month are handled by Attorney General staff."

Legal Services Provided

L&I receives more than 15,000 claims for industrial insurance benefits each month. Although most of these claims are administered and resolved within L&I, more than 700 disputed claims per month are handled by Attorney General staff. These industrial insurance appeals constitute nearly two-thirds of the division's workload. Approximately 35 percent of these appeals are resolved by paralegals through a mediation process. Individual attorney caseloads typically represent several million dollars in exposure to L&I's accident and medical aid funds and present complex medical, vocational and

Labor and Industries Division

"Current caseloads for the division include more than 55 cases currently pending in state and federal appellate courts."

- legal issues. A single pension case represents an average of \$450,000 in potential liability. Attorneys practice before the Board of Industrial Insurance Appeals and before the state courts at all levels.

Numbers/Trends

- The Board of Industrial Insurance Appeals hears all appeals filed by injured workers and by employers. The BIIA granted approximately 7,400 industrial insurance appeals in fiscal year 2003. This represents a decrease of 6.8 percent from the number of industrial insurance appeals granted in fiscal year 2002. The BIIA granted approximately 434 WISHA appeals in fiscal year 2003. This represents an increase of approximately 14.8 percent from the number of WISHA appeals granted in fiscal year 2002. Current caseloads for the division include more than 55 cases currently pending in state and federal appellate courts.

Significant Cases and Their Impact

- **Washington State Farm Bureau v. Trause, et al.:** The Farm Bureau has initiated an action in federal district court alleging that absent the consent of the land owner, warrantless inspections conducted by L&I staff for the purpose of enforcing the Washington Industrial Safety & Health Act are unconstitutional. The Farm Bureau further alleges that the department does not have the authority to obtain administrative inspection warrants under Washington law. The department has responded by arguing that the federal action is largely precluded by the 11th Amendment of the U.S. Constitution, and by defending the constitutionality of its inspection practices.

- **WECARE, et. al., v. Department of Labor and Industries:** L&I promulgated rules establishing ergonomic standards in the workplace. The rules are intended to reduce the number and severity of muscular-skeletal injuries, including repetitive motion injuries, which represent both the most common sort of worker injury and the category generating the highest claim costs. A variety of businesses and trade associations initiated an action in superior court claiming procedural irregularities in the rule-making process and disputing the assumptions on which the rules were based. The superior court upheld L&I's rules in all respects. The Supreme Court accepted direct review. The rules were repealed in the November 2003 election by Initiative 841. The parties have submitted briefing arguing that the case is now moot.

- **Rhodes v. Department of Labor and Industries and Related Cases:** Where a worker has received an award for permanent partial disability (PPD) and later receives a pension, statutes direct L&I to reduce the pension award in a manner designed to recoup the PPD award. There are a number of cases pending in both superior court and at the BIIA that question the manner in which L&I effects the reduction. Among these cases is Rhodes,

Labor and Industries Division

a class action recently dismissed by the superior court for plaintiffs' failure to exhaust administrative remedies.

Major Issues/Events

Cockle v. Department of Labor and Industries: The state Supreme Court held in January 2001 that employer contributions for health care benefits provided to workers and their families constitute "wages" that must be considered when calculating workers' compensation benefits. Since this decision, claimants have been seeking to establish through litigation that various other benefits should also be included in the wage computation. This presents a significant workload issue for L&I, the BIIA, and the division.

Rios, et. al., v. Department of Labor and Industries: L&I promulgated rules under WISHA designed to protect farm workers from pesticides. In addition, L&I developed a guideline recommending, but not requiring, blood monitoring of workers exposed to pesticides. Plaintiff farm workers appealed L&I's decision not to require blood monitoring. In February 2002, the state Supreme Court ordered L&I to "initiate rulemaking on a mandatory... monitoring program for agricultural pesticide handlers." The rules, newly promulgated, are the subject of close scrutiny by both business and labor organizations.

Premium Increase: In December 2003, L&I announced industrial insurance premium increases averaging 9.8 percent. The increases were largely attributable to stock market reversals affecting L&I administered trust funds, increases in the costs of medical care and court decisions that have tended to expand worker benefits. This increase, on top of last year's 19 percent increase, is expected to prompt significant debate in the upcoming legislative session.

Emerging Areas of the Law: Attorneys in the division are working closely with L&I in matters that involve emerging areas of the law. L&I's efforts include assisting the agricultural industry with farm worker safety issues, ensuring minimum wages for minors, reducing long term disability of injured workers, ensuring that injured workers receive fair and competent vocational services, ensuring that workers are properly classified for purposes of industrial insurance coverage, and utilizing complex information systems to speed the delivery of benefits and services to injured workers.

Labor and Personnel Division

"The division provides client advice and assistance to its clients on a variety of personnel-related matters, such as the Americans with Disabilities Act, the Family Medical Leave Act, Fair Labor Standards Act, Washington Management Service and Merit System, and labor relations issues."

● Summary of Responsibility

- The Labor and Personnel Division provides centralized employment and personnel-related legal services and expertise to state agencies and higher education institutions. The division currently supports all state agencies with the exception of the University of Washington, which receives its employment related legal services from the University of Washington division, and certain Western Washington higher education institutions, which receive employment-related legal services from the Education divisions.

● Legal Services Provided

- The division represents state agencies and higher education institutions in employee discipline, disability separation, and certain rule violation and reduction-in-force appeals before the Personnel Appeals Boards, and the various Washington State Patrol hearing boards. The division also represents agencies in unfair labor practice complaints and grievance arbitrations before the Public Employment Relations Commission, the Personnel Resources Board and the Marine Employees Commission as well as agencies in appeals of these administrative decisions to superior courts.
- The division provides client advice and assistance to its clients on a variety of personnel-related matters, such as the Americans with Disabilities Act, the Family Medical Leave Act, Fair Labor Standards Act, Washington Management Service and Merit System, and labor relations issues. It also handles wage-related cases in state and federal courts.
- Over the past year, the division has conducted training for state agencies on a variety of topics, including employee misconduct investigations, the Public Records Act, processing discovery, the Family Medical Leave Act, workplace violence, labor relations and reasonable accommodation. The division continues to sponsor monthly personnel manager meetings for state agency personnel staff to discuss case law updates as well as special employment-related issues. The division also sponsors bi-monthly personnel manager meetings in Eastern Washington.

● Numbers/Trends

- The division currently has an active caseload of approximately 369 cases. In addition, the division has approximately 750 pending files related to issues, subjects and situations upon which the division is called to give advice.

Labor and Personnel Division

Personnel Appeals Board: There are 268 active cases before the board on employee appeals of agency disciplinary actions, alleged violations of merit system rules by state agencies, separation of employees based on the inability to perform essential job functions, and layoffs.

Personnel Resources Board: The division's current caseload of 12 cases before the board involves grievance arbitrations under collective bargaining agreements. This number reflects the continued trend of giving this work back to agencies and training agency personnel to represent themselves before the board.

Public Employment Relations Commission: With the passage of the Personnel System Reform Act, the Public Employment Relations Commission assumed jurisdiction over unfair labor practices and questions concerning representation for state employees. Currently, the division has 33 cases pending before the commission. This increase has occurred as employees have organized in advance of full scale collective bargaining that takes effect in 2005.

Marine Employees Commission: The division currently has 24 grievance arbitrations and unfair labor practice charges pending before the Marine Employees Commission. This number has remained fairly steady over the last few years.

Tort Issues: While the division no longer litigates employment related tort cases, it does provide proactive client advice on issues carrying tort implication and, where appropriate, engages in early dispute resolution. The division works closely with the Torts Division's Employment Team to provide a continuum of employment related advice and representation. The two divisions sponsored an Employment Risk Summit to address risk management issues in the employment arena.

Judicial Review Appeals: This past year, the division has experienced a slight increase in the number of administrative cases being pursued through the state courts. The division currently has 19 cases pending on appeal, either as judicial reviews or in the appellate courts.

Miscellaneous: The division handles other miscellaneous cases, which include Human Rights Commission complaints, unemployment compensation, wage, contracting out and public disclosure claims.

"The division is currently handling five wage cases, including three class action wage cases brought by state employees."

Major Issues/Events

Wage Cases: The division is currently handling five wage cases, including three class action wage cases brought by state employees. The cases include overtime claims for breaks and lunch period, pre- and post-shift activities, and allegations dealing with classification of Correctional Lieutenants.

Public Disclosure: The number of requests for public employment records continues to rise. The rise has been dramatic in the area of state employee

Labor and Personnel Division

- personnel records. In challenging agency personnel decisions, it is no longer uncommon for litigants to request personnel files of agency staff. Additionally, individuals who are the subject of investigations are using the court system more often to preclude the disclosure of completed investigative materials.
- The Personnel System Reform Act:** In 2002, the Legislature passed the Personnel System Reform Act of 2002. This act will completely change the landscape of employer-employee relations in state government. First, the current civil service system will be completely overhauled. Second, state employees will now be able to engage in full-scale collective bargaining, including the right to bargain wages. Finally, the rules regarding contracting out of services will be relaxed. These changes all have an impact on the work of the division. The division is now advising state agencies and higher education institutions as the act phases into effect.
- Immigration:** The division continues to receive requests for advice concerning immigration and visa issues, although the number of requests declined from last year. A special assistant attorney general has been appointed to address questions from client agencies, including information on visa applications, assistance with agency personnel visa applications and representation before the Immigration and Naturalization Service.

Licensing and Administrative Law Division



Summary of Responsibility

The Licensing and Administrative Law Division provides full legal services to three state agencies: the departments of Licensing, Employment Security, and the Board of Accountancy. It also provides legal advisors for a number of the state's boards and commissions, including the Public Disclosure Commission, the Liquor Control Board, the Salmon Recovery Funding Board, the Columbia River Gorge Commission, the Growth Planning Boards, Environmental Hearings Office, the Executive Ethics Board and the Legislative Ethics Board.

The division handled more than 2,500 cases last year in a variety of administrative, state, and federal forums, with more than half coming to closure. The division has expertise in the areas of administrative and appellate procedure, public records and open public meeting issues, and professional and driver and vehicle licensing issues.

"The division handled more than 2,500 cases last year in a variety of administrative, state, and federal forums, with more than half coming to closure."

Legal Services Provided

The division's attorneys and professional staff provide legal services that include advice and counseling on rule-making, contracts, policy writing and proposed legislation, as well as representation in actions filed against client agencies and their employees and officers. In addition, attorneys represent the state in regulatory prosecutions before administrative tribunals, appeals to superior court of administrative hearing decisions, and in other actions against the state in the federal courts or the Washington State Courts of Appeal and Supreme Court.

The different kinds of steady litigation handled by the division include:

- **State Board of Accountancy:** Professional licensing disciplinary cases initiated by the Board against accountants who violate the licensing law through misconduct.
- **Employment Security Department:** Appeals in Washington State courts seeking review of claims in which unemployment benefits were denied to claimants or the granting of benefits to a claimant, appealed by an employer.

Cases, usually at the appeal level, which seek payment of unemployment insurance taxes from employers, who either claim to be exempt from payment of the tax, challenge the change in status as a covered employer or claim that their tax liability should be less.

Licensing and Administrative Law Division

- **Department of Licensing:** Appeals in superior court where drivers challenge their breath test results or their refusal to take breath tests when suspected of drinking and driving.

- License suspension appeals in superior court for uninsured drivers involved in vehicle accidents where there is personal injury or property damage.

- Matters in superior court or in higher courts to defend challenges to driver license laws or agency decisions against drivers for other violations of the drivers license law, like driver improvement or commercial driver license suspensions.

- Regulatory misconduct matters brought before administrative law judges against professional licensees, such as real estate licensees and vehicle dealers, and tax assessment matters against motor vehicle fuel distributors.

Major Issues/Events

Department of Licensing-Vehicle Excise Tax

Manion, et al. (formerly Bruns) v. Department of Licensing and Stephens: This is a civil superior court case arising out of the repeal of the motor vehicle excise tax (MVET) that went into effect on January 1, 2000. The registration year of most vehicles registered in 1999 extended into 2000. The plaintiffs seek refunds of the portion of the MVET paid in 1999 but attributable to 2000 since the MVET had ceased to exist on January 1, 2000. Plaintiffs claim to represent a class of vehicle owners, but have not sought certification of the class. The plaintiffs have estimated the amount of refunds they seek as approximately \$200 million.

On January 17, 2003, the case was dismissed on defendants' motion with the exception of claims that the defendants administered the MVET in a manner that discriminated against the owners of out-of-state commercial vehicles in violation of the Commerce Clause of the U.S. Constitution.

Department of Licensing- Initiative 776/ Motor Vehicle Taxes

Pierce County et al., v. State of Washington, et al.: This case arises out of the passage of Initiative 776, an initiative that repealed or reduced several taxes imposed on motor vehicles registration. The constitutionality of Initiative 776 was challenged by numerous governmental entities, organizations, and individuals, including King and Pierce counties and Sound Transit, chiefly on the ground that it violated our state constitution's prohibition against two subjects in a single enactment, its subject-in-title requirement, and impaired a contract between King County and holders of bonds for which a repealed tax had been pledged as a source of payment.

Licensing and Administrative Law Division

On October 30, 2003, the Washington Supreme Court upheld the constitutionality of Initiative 776 and found that it did not impair the contract between King County and its bond holders.

Public Disclosure Commission -- Campaign Statutes

Washington Education Association v. Public Disclosure Commission:

This was a civil case in the state Supreme Court concerning whether PDC guidelines explaining the statutory prohibition at 42.17.130 on the use of public facilities to support or oppose campaigns are constitutional. The WEA, a labor union, sued the PDC in King County Superior Court under the Administrative Procedure Act and the federal civil rights statute. The trial court agreed with the WEA's arguments that the union and its members have a federal First Amendment free speech right to use the public facilities of public schools, such as the schools' e-mail systems and hallways, to distribute WEA campaign materials supporting or opposing ballot measures. The trial court enjoined the PDC from further distribution of the guidelines, or similar materials explaining RCW 42.17.130. The PDC appealed directly to the state Supreme Court and argued that the statutory restrictions on such use of public facilities is a constitutional measure to ensure fair elections by prohibiting public agencies from employing taxpayer resources to support one side or another in a campaign. The Supreme Court ruled in favor of the PDC but did not reach the constitutional issue. Instead, the Supreme Court found that the PDC guidelines only gave the agency's view of the law and were not enforceable like a statute or rule. The Supreme Court ruled the guidelines were not justiciable and thus could not be challenged in court. The Supreme Court reversed the trial court.



Regional Services Division

"The Regional Services Division offices act as extensions of the main divisions and clients for whom they do work: Labor and Industries, Department of Social and Health Services, Education, Employment Security and Department of Licensing."

● Summary of Responsibilities

- The Regional Services Division consists of seven offices located in Bellingham, Port Angeles, Everett, Vancouver, Kennewick, Yakima, and Wenatchee. There are a total of 43 attorneys, and 49 professional staff in the division. The division represents the Department of Social and Health Services, Department of Labor and Industries, the Department of Licensing, Employment Security Department, Western Washington University, Central Washington University and the following community and technical colleges: Peninsula, Whatcom, Bellingham Technical, Skagit Valley, Everett, Edmonds, Clark, Lower Columbia, Walla Walla, Columbia Basin, Yakima Valley and Wenatchee Valley, as well as the School for the Deaf, the School for the Blind and several Educational Service Districts. Each of the Bellingham, Kennewick and Vancouver offices has a Consumer Resource Center.
- The division's practice includes hearings before administrative boards as well as trials and appeals in state and federal court.

● Legal Services Provided

- The Regional Services Division offices act as extensions of the main divisions and clients for whom they do work: Labor and Industries, Department of Social and Health Services, Education, Employment Security and Department of Licensing. The specific legal services provided are similar to those listed in the reports for those divisions, with a heavy emphasis on litigation at the administrative and superior court level.

● Numbers/Trends

- The numbers and trends for the work in the division fairly well mirror those of the main divisions, with greater increases in rapidly growing areas such as Clark and Snohomish counties. In 1988, the division had 21 attorneys in five offices. Due to increase in workload over the past 14 years, the division has added two offices, Wenatchee and Port Angeles, and doubled the number of attorneys and professional staff.

Regional Services Division

Significant Cases and Their Impact/ Major Issues/Events

Cases of significance and major issues and events are included in the main divisions' reports.

Social and Health Services Division

"The majority of legal services are in litigation-related activities, including initiating dependency cases in which a child has been abused or neglected; filing for termination of parental rights when a child has been out of the home and the parents are unable to care for the child; and licensing actions relating to foster homes, group care, daycare facilities, and child-placing agencies."

● Summary of Responsibility

- DSHS administers a variety of federally and state-funded programs to protect the general public and assist those who are unable to provide for themselves. Programs include income and medical assistance, food stamps, children's services, child support, mental health services, developmental disabilities, juvenile rehabilitation, alcohol and drug rehabilitation, vocational rehabilitation, nursing home surveys, adult protective services, home and community care services and other related community social services program activities.

- Five divisions of the Attorney General's Office provide legal services to DSHS in addition to the specialized services of the Torts Division and Labor and Personnel Division. The majority of legal support to DSHS falls into two main areas: children's services litigation and advice and representation for DSHS headquarters in Olympia. Currently, 70 percent of the legal services support juvenile dependency and parental rights termination cases, as well as the other child welfare services programs.

- In addition to representing DSHS, the Social and Health Services Divisions also provide legal support to the Department of Veterans Affairs and the Department of Services for the Blind.

● Legal Services Provided

● Major DSHS Program Areas

- **Children's Services:** The majority of legal services are in litigation-related activities, including initiating dependency cases in which a child has been abused or neglected; filing for termination of parental rights when a child has been out of the home and the parents are unable to care for the child; and licensing actions relating to foster homes, group care, daycare facilities, and child-placing agencies. Client advice, for both DSHS headquarters and regional offices, is provided to the Children's Administration, which administers child protection and welfare programs.

- **Economic Services:** The Economic Services Administration (ESA) administers public assistance programs, including Temporary Assistance to Needy Families (TANF), food stamps, general assistance, Supplemental Security Income (SSI), telephone assistance and refugee assistance. Litigation ranges from individual appeals of reductions to or denials of benefits to class action lawsuits challenging program implementation. Other significant issues include the development of agreements with Indian tribes for the delivery

Social and Health Services Division

of TANF and Workfirst services on the reservations, confidentiality of client records, electronic application for and delivery of public assistance benefits, ongoing advice on proposed and enacted legislation, and administrative regulations on both the state and federal levels. ESA also administers the child support program. Legal services provided to the Division of Child Support (DCS) include both legal advice and litigation support. Litigation primarily involves class action lawsuits challenging administration of the program and representation of DCS in appeals to superior court under the Administrative Procedure Act and in bankruptcy court. Prosecutors generally handle litigation relating to individual child support orders.

Medical Assistance: The Medical Assistance Administration (MAA) is responsible for administering federal and state programs that provide medical services to indigent residents. Legal services to MAA include client advice and representation before federal and state tribunals on issues concerning: compliance with the federal Medicaid laws; payment rates paid to hospitals and other medical providers; medical services provided; contract disputes with medical providers, including contractual agreements with managed care plans and providers in the Healthy Options program; and Medicaid eligibility issues.

Aging and Adult Services: The DSHS Aging and Adult Services Administration administers a wide variety of programs that provide services to the elderly and to vulnerable adults in the state. Those programs include residential care services (nursing homes, adult family homes, boarding homes, and the resident protection program); home and community services (Medicaid personal care, COPES, Chore and adult protective services); and management services. Attorneys provide legal advice on the interpretation of state and federal (Medicaid) laws that govern DSHS' programs. They also represent the agency in litigation, including, but not limited to, provider licensing actions, provider contract termination actions and Medicaid rates paid to providers.

Mental Health: The DSHS Mental Health Division operates the two state mental hospitals and the Child Study and Treatment Center and also contracts with Regional Support Networks to provide Medicaid and state-funded community mental health services. Legal advice is provided to the state hospitals on a wide variety of issues ranging from patient health care and confidentiality, to contracts for educational services for minor patients at the children's facility, to questions concerning the forensic services unit. Legal advice and representation are provided in all civil commitment hearings and jury trials at Western State Hospital and Eastern State Hospital. Attorneys represent the state hospitals in civil rights litigation concerning patients' rights to various types of treatment and services. Advice to the Mental Health Division covers such issues as Medicaid and Medicare financing, licensing, and contracts with the Regional Support Networks. Attorneys also represent the Mental Health Division in litigation concerning disbursement of Medicaid funds and reimbursement of community mental health providers.

Special Commitment Center: The Special Commitment Center (SCC) houses DSHS' program for the involuntary treatment of sexually violent

Social and Health Services Division

"As of December 31, 2003, AAGs were representing DSHS in approximately 9,500 child welfare cases pending in juvenile courts around the state."

- predators. Litigation has involved complex civil rights challenges by program residents against all aspects of the program, and, more recently, challenges by communities objecting to the potential siting of the proposed King County Secure Community Transition Facility for residents who a court has determined can be treated in a less restrictive alternative. The office also defends individual civil rights or torts actions brought by residents of the SCC in federal court.

- **Developmental Disabilities:** This DSHS Division operates five residential habilitation centers for the developmentally disabled and contracts with counties and private providers for home and community-based residential and day programs. Legal services involve ongoing advice to division staff on various issues, including eligibility for services, federal reimbursement, program certification, contract issues, civil rights and right to treatment issues, public disclosure, and adoption of administrative rules and policies. Litigation issues include eligibility and access to services, access to clients and client records by the Washington Protection and Advocacy System, standards of care in institutions and state mental hospitals, right to community placement under the Olmstead decision interpreting the Americans with Disabilities Act (ADA) and medical decision making.

- **Juvenile Rehabilitation:** The Juvenile Rehabilitation Administration (JRA) provides for the care, custody, rehabilitation and community supervision of court-committed juvenile offenders. JRA operates six institutions, one basic training camp, and seven state-operated group homes. It also contracts out for additional community residential placements. Legal services to JRA include program advice on a variety of issues, such as terms and conditions of confinement, right to treatment, conditions of parole, public disclosure and community protection requirements.

- **Office of Deaf and Hard of Hearing Services:** This division of DSHS provides telecommunications access to individuals who are hearing or speech impaired. It provides telecommunications equipment to eligible persons and contracts out for a telecommunications relay service that provides telephone access to the hearing-impaired. The Office of Deaf and Hard of Hearing Services also contracts out with regional providers for access programs and advocacy services for hearing impaired persons. The division's primary legal service is to provide client advice on issues such as eligibility, contract formulation and administration and interpretation of statutes and regulations.

- **Child Welfare Litigation:** As of December 31, 2003, AAGs were representing DSHS in approximately 9,500 child welfare cases pending in juvenile courts around the state. Approximately 8,000 are dependency actions seeking court-ordered protection, placement, or supervision of children alleged or found to have been abused, neglected, or seriously endangered by their parents. When it is not possible to reunite children with their parents, legal action is initiated to permanently place children elsewhere. The number of termination actions has increased over the past five years, and the actions focus more on moving children out of the foster care system and into permanent homes as early as possible.

Social and Health Services Division

Appellate Litigation: As of December 31, 2002, there were approximately 215 appellate cases pending in state and federal courts. The vast majority of these cases are challenges to lower court decisions in child welfare cases, primarily terminations, and generally the appeals relate to the specifics of the particular cases. However, included in this number are several cases involving significant legal challenges to DSHS programs. The major cases are discussed below.

Programmatic Challenges: In recent years, there has been an increase in court challenges to DSHS programs and services. The litigation, generally brought in federal court, is very staff intensive and time consuming. It can result in the judicial system having a greater role in policy making and in potentially significant awards of attorneys' fees against the department.

Other Client Agencies

Department of Veterans Affairs: The Department of Veterans Affairs (DVA) provides residential, financial, and advocacy services to qualified veterans who are state residents, and to veterans' families and survivors. Residential services are offered in two veterans homes serving approximately 550 residents in Medicaid-funded nursing home settings. A third veterans home was recently authorized by the Legislature, to serve approximately 100 additional residents in Spokane. The state veterans' homes provide 24-hour nursing and assisted living services in addition to medical and pharmacy services to residents. DVA also offers financial services to veterans by acting as protective payee or fiduciary over income and benefits. DVA staff provide advocacy services to assist veterans in accessing needed state and federal veterans programs. Legal services provided to DVA involve primarily client advice. Recurring topics include eligibility for services, rights of veterans, veterans' home policies and regulations, nature and scope of DVA's fiduciary authority and federal Medicaid requirements for nursing facilities.

Department of Services for the Blind: The Department of Services for the Blind (DSB) provides a range of services to visually impaired individuals to assist them in establishing or maintaining their productivity, employability and independence. Legal services for this agency consist primarily of client advice on such issues as eligibility for services, interpretation of applicable statutes and regulations and various other matters

Number/Trends

Child Welfare Litigation: No single child welfare case by itself may have statewide significance; but, cumulatively, decisions in these cases have a profound impact upon affected children and their families, as well as the community at large. The issues and challenges include determining what is best for children who are abused or neglected by parents who are not currently capable of meeting their child's needs; whether the child should be returned home; how frequent visitation should be, if at all; what services the parents should be required to undertake; and finally, whether some parents should have their parental rights severed because they have been

"No single child welfare case by itself may have statewide significance; but, cumulatively, decisions in these cases have a profound impact upon affected children and their families, as well as the community at large."

Social and Health Services Division

- unable to correct underlying problems. A tremendous volume of these cases are presented to the courts each year - according to data from the
- Administrative Office of the Courts, approximately 3,900 dependency cases were filed on behalf of children during 2003 -- the vast majority of them
- by handled by AAGs. This represents a modest decrease in the number of filings over 2002

● Significant Cases and their Impact

- **Keffeler v. DSHS:** This is a class action brought by foster children receiving financial benefits under Titles II and XVI of the Social Security Act. The
- Okanogan County Superior Court ruled that DSHS may not use foster children's Social Security benefits to help pay for their foster care, even
- though this practice is approved by the Social Security Administration and followed in every other state. The Washington Supreme Court upheld the
- trial court in a 5 - 3 decision based on its reading of the Social Security Act, and the state appealed to the U.S. Supreme Court. On February 25, 2003,
- the high court reversed the decision and upheld the department's practice. On remand, the Washington Supreme Court agreed to consider plaintiffs'
- claim that the Washington program violated procedural due process and equal protection, issues that it had not addressed in its first ruling. It heard
- oral argument on October 30, 2003. An adverse ruling could cost DSHS several million dollars annually as well as potentially many more millions
- of dollars in refunds. More importantly, if the trial court's ruling ultimately stands, it is likely that the foster children who were otherwise eligible for
- these payments would not receive them, because, in most cases, if DSHS did not apply for the benefits on behalf of the children, there is no one else
- to do so.

- **Premera Blue Cross v. DSHS and Health Care Authority and Group Health v. DSHS:** Premera and Group Health are managed care organizations
- that entered into contracts with DSHS under which they would be responsible for ensuring medical services were provided to certain Medicaid recipients
- and other low-income individuals. Unlike most Medicaid recipients, persons who receive SSI from the federal government are not required to join a
- managed care plan. The plans filed their lawsuits based on the belief that DSHS failed to ensure that SSI recipients were excluded from their managed
- care plans. The plans both assert that medical care for SSI recipients is more costly than medical care for the general population, and seeks recovery of
- the costs of providing services to SSI recipients. DSHS has succeeded in having five of Premera's claims dismissed, and the potential damages on a
- sixth cause of action significantly limited, via summary judgment motions. The case was settled late in 2003 for \$2.375 million, approximately 15
- percent of the amount claimed.

- **Sacred Heart Medical Center v. DSHS:** Several health care providers who participate in the Medicaid program sought reimbursement for the
- health care they allege that they provided to individuals who had been terminated from the Medicaid program. The providers alleged that they
- were entitled to reimbursement because those individuals' Medicaid eligibility

Social and Health Services Division

had been terminated improperly based on the clients' termination from the Temporary Assistance to Needy Families cash grant program. Almost half of the providers were dismissed, either voluntarily or on motion, and the liability phase of the trial took place in April 2003. After the Thurston County Superior Court found the department liable, the claims the remaining providers were settled for \$25 million. Four of those providers were county-operated Regional Service Networks, and the department is attempting to resolve claims from other RSNs without litigation.

Townsend v. Braddock: This class action lawsuit challenges the income eligibility requirements for the state's Community Options Program Entry Services (COPES) program, which provides Medicaid funded long-term care services in home and community settings for persons who are otherwise not eligible for Medicaid nursing home care. The plaintiffs claim that the Americans with Disabilities Act (ADA) requires the state to provide them long-term care services in the most integrated setting appropriate to their needs. The U.S. District Court ruled that the COPES income requirement does not discriminate based on disability and that the ADA does not require the state to create new programs or to fundamentally alter existing programs. The plaintiffs appealed that decision to the Ninth Circuit Court of Appeals, which reversed the trial court in May of this year. In December 2003 the parties agreed to stay the case pending DSHS's implementation of a medically needy home and community waiver program.

Cases Affecting DSHS and Legislative Policy Choices and/or Resource Allocations

Braam v. State: This lawsuit was brought initially as a tort claim, but ultimately converted to a class action on behalf of children currently or previously placed in foster care by DSHS, alleging that their treatment while in the department's custody failed to meet constitutional minimums. Following several weeks of trial, in which the jury was allowed to consider evidence of events from as long as 15 years ago, the jury agreed with the plaintiffs, setting the foundation for the Whatcom County Superior Court judge to order improvements to the state's foster care system. This decision was appealed to the Washington Supreme Court which on December 18, 2003 issued its opinion reversing the trial court and vacating the injunction. The case will now go back to Whatcom County Superior Court for further proceedings. A new trial has been scheduled for September 14, 2004.

Turay v. Weston: This civil rights action challenges the conditions of confinement at the Special Commitment Center for sexually violent predators. All claims but one were eventually resolved in favor of SCC in 1994. On one claim, the jury found the treatment program was constitutionally inadequate. The federal court appointed a special master who has submitted 19 reports evaluating the progress that SCC has made toward improving its treatment program. On November 15, 1999, the court found DSHS in contempt for failure to make program improvements quickly enough. The most recent injunction hearing was held in October 2003. The primary remaining issue is the establishment of an off-island community transition program for residents who are successfully progressing in sex offender treatment. In a related development, the department has selected a site for such a facility

"This lawsuit was brought initially as a tort claim, but ultimately converted to a class action on behalf of children currently or previously placed in foster care by DSHS, alleging that their treatment while in the department's custody failed to meet constitutional minimums."

Social and Health Services Division

- on South Spokane Street in Seattle, and the city of Seattle filed a lawsuit challenging that decision.

- **Allen v. Western State Hospital:** This civil rights action challenges the quality of services for developmentally disabled patients at Western State Hospital. This lawsuit followed a finding by the federal government through the Health Care Financing Administration (now Center for Medicare and Medicaid Services) that there were deficiencies in the services provided to developmentally disabled patients. The parties have agreed to a stay of this lawsuit to allow DSHS to implement a three-phase plan to improve services for developmentally disabled hospital patients. A monitoring committee, whose membership was agreed upon by the parties, has been given full access to the programs. Committee members have been positive about many of the changes made at Western, but a few areas continue to raise concerns. The settlement agreement provided that this case will remain stayed until DSHS completes its plan or plaintiffs become dissatisfied with DSHS' implementation of the plan. However earlier in 2003 a lawsuit was filed on behalf of 13 *Allen* class members raising similar claims. That lawsuit was resolved when the department implemented a negotiated discharge policy regarding DDD patients at WSH who are ready to be transitioned to the community.

- **Ebert v. DSHS:** This class action in federal court challenged the department's implementation of legislatively mandated changes to the state's supplemental payments (SSPs) to aged, blind and disabled persons who receive federal Supplemental Security Income (SSI) from the Social Security Administration. The Social Security Act requires that the department maintain at least the total level of SSP payment as in prior years, a requirement that had been satisfied prior to July 2002 by providing relatively small SSPs to more than 100,000 SSI recipients. The 2002 supplemental budget directed the department to redirect those payments to specifically targeted populations, primarily those with developmental disabilities. The plaintiff in this case asked the federal district court to declare the department's program in violation of both the Social Security Act and the state Administrative Procedures Act. In October 2003, the court granted the department's motion for summary judgment on the Social Security Act claim and declined to rule on the state law claim. A contrary ruling could have put the department at risk of having to pay as much as \$20 million in additional benefits. The plaintiffs have appealed to the Ninth Circuit Court of Appeals, and a decision is expected in late 2004 or early in 2005.

- **Arc of Washington v. Quasim:** This lawsuit, brought as a class action, alleges that DSHS is violating federal Medicaid law, the ADA, and the equal protection and due process clauses of the United States Constitution in its management of Medicaid-funded services for clients with developmental disabilities. Plaintiffs claim that DSHS must offer a choice of institutional or community-based residential services to all clients who are eligible for such services under Medicaid. DSHS currently operates those programs within available funds appropriated by the Legislature. Plaintiffs claim that the services are legal entitlements that must be provided to all eligible individuals. The district court ruled that no entitlement exists to Medicaid-funded services provided by Division of Developmental Disabilities (DDD)

Social and Health Services Division

through the Home and Community-based Services waiver, and that the ADA did not prohibit the state from limiting the number of clients receiving services through the waiver. The parties negotiated a proposed settlement providing for dismissal contingent on agreed-upon increases in legislative appropriations for DDD services in fiscal year 2003 and during the 2004-2005 biennium. On December 3, the court rejected the parties' proposed settlement, ruling that the proposed subclasses had conflicting interests and inadequate representation and that the settlement failed to ensure relief to all class members. The court decertified the class and a few months later granted the Department's motion to dismiss, a decision that has been appealed to the Ninth Circuit Court of Appeals. Oral argument on the appeal is likely to be scheduled for the spring of 2004.

Boyle v. Braddock: This class action was filed by Columbia Legal Services (CLS) in U.S. District Court in Tacoma. The complaint identifies four Division of Developmental Disabilities' clients receiving services through its Community Alternatives Program (CAP) waiver, which receives matching funds through Medicaid and must meet certain Medicaid requirements. Columbia Legal Services alleges that DDD does not inform clients on the waiver, whose numbers approximate 11,000, about services available to them, about how to obtain services, and does not provide mandated services with reasonable promptness. The complaint also alleges that DDD does not provide adequate notice and hearing rights to clients on the waiver. CLS seeks class certification and injunctive relief regarding their claims. On January 18, 2002, the court granted the state's motion to stay the case pending the court's consideration of the proposed settlement agreement in *Arc v. Quasim*. On December 3, 2002, the court rejected the proposed settlement in *Arc* and, as a result, lifted the stay in *Boyle*, and in February 2003, the trial court denied the plaintiffs' motion to have the case proceed as a class action. As with the *Arc* case above, the court also granted the department's motion to dismiss and that decision has also been appealed to the Ninth Circuit.

Rust v. Western State Hospital: This class action lawsuit involved claims of unconstitutional conditions of confinement for patients detained in the hospital's Center for Forensic Services. Plaintiffs alleged numerous instances of patient-to-patient assaults due to a failure to adequately staff the center for Forensic Services. In addition, there were allegations related to the building that housed the Center for Forensic Services, which was condemned following the February 2001 earthquake. This lawsuit was settled with DSHS agreeing to hire additional staff sufficient to insure that patients receive active mental health treatment and supervision. Progress in implementing the settlement continues to be monitored by two court-appointed experts. A subsequent three and one-half year period of self-monitoring will commence upon completion of the outside monitoring.

Marr v. Eastern State Hospital: This is another lawsuit brought by the Washington Protection and Advocacy System. Like the *Allen* case discussed above, this lawsuit challenges the statutory and constitutional adequacy of services for developmentally disabled patients, but focuses on Eastern State Hospital (ESH). The substantive issues in the case have been settled by the parties. The settlement requires monitoring by a two-person committee

"This lawsuit was settled with DSHS agreeing to hire additional staff sufficient to insure that patients receive active mental health treatment and supervision."

Social and Health Services Division

- selected by the parties for a period of three years. It also explicitly extends the terms of the *Allen* settlement to class members residing in Eastern Washington.

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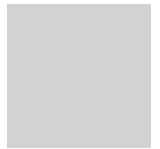
● Major Events/Issues

- **Anticipated Budget Cuts:** In view of the state's revenue projections, DSHS is developing budget packages that must include very significant reductions in many programs administered by the agency. If some or all of these cuts are enacted by the Legislature, there will likely be a significant increase in program-related litigation. Division attorneys are working with agency staff to be positioned to defend decreases in programs and services resulting from reductions in DSHS' budget.

- **Department of Justice Investigation of State Residential Habilitation Centers:** In May 1998, the U. S. Department of Justice (DOJ) initiated two new investigations of state institutions for the developmentally disabled under the federal Civil Rights of Institutionalized Persons Act (CRIPA). CRIPA investigations resulted in a determination by DOJ whether program deficiencies exist which violate residents' civil rights under the constitution and the ADA. An agreement was negotiated with DOJ resulting in an expedited investigative process which would hopefully avoid the prolonged investigation that occurred at Fircrest School from 1991-1998. Following a tour of the two state facilities in January 1999, DOJ issued a findings letter alleging civil rights violations at both institutions. DSHS challenged those findings while agreeing to pursue program improvements to address significant concerns of DOJ. Although the reports of DOJ's medical expert following a subsequent inspection was for the most part very positive about medical services at both institutions, the report issued by DOJ's expert in psychological services included numerous findings alleging failure to meet minimum professional standards. DSHS responded by refuting most all the allegations of DOJ's expert and contracting with an out-of-state psychiatrist and psychologist to evaluate the programs at both facilities. The very positive reports of these consultants were sent to DOJ, which has proposed a mutually agreed expert in behavioral programs to visit the facilities and make the ultimate determination whether they are meeting minimum professional standards. DSHS is evaluating whether to agree to a mutual expert, or whether to propose some other process to achieve closure to these investigations.

- **CMS Investigation of CAP Waiver:** In 2002, the federal Center for Medicaid and Medicare Services (CMS) conducted an audit of DSHS' Community Alternative Program (CAP) waiver, also known as the Home and Community-based Services waiver. This waiver program provides federal matching funds for community-based services for people with developmental disabilities who would otherwise face institutionalization. The CAP waiver requires compliance with detailed federal standards in order to maintain eligibility for federal funding. The audit of the waiver by CMS staff revealed significant alleged non-compliance issues and identified several millions of dollars for potential recovery from the department, although CMS has yet to initiate formal proceedings.

Seattle Division



Summary of Responsibility

The Seattle SHS Division provides legal services to the Department of Social and Health Services in King County. The division consists of 25 assistant attorneys general, one administrative manager and 18 other staff including legal assistants, paralegals and other professional support staff.

Legal Services Provided

The division provides legal representation to the Department of Social and Health Services in all levels of state and federal court and administrative tribunals. Approximately 69 percent of the division's caseload involves juvenile court litigation (juvenile dependency and termination of parental rights proceedings). The other types of work handled include foster care and day care licensing hearings, adult family home and boarding home licensing hearings and adult protective services guardianships.

Numbers/Trends

During the past year, there was a 20 percent increase in the number of adult protective services guardianships, protective orders and guardianship fees cases. The division has become more active in the area of adult abuse, neglect and exploitation. While this trend is disturbing, adult protection remains a priority for the division.

The number of new juvenile dependency cases decreased from the previous year. This decrease has been a trend for the past four years and may be attributed to a number of different reasons including, prevention and in-home services provided by the department.

Significant Cases

In re T.C.: The department is seeking review in the Washington Court of Appeals, Division I of a Child in Need of Services (CHINS) case. The youth who is the subject of the CHINS petition is also an adjudicated sex offender and is seeking to avoid incarceration by having the department find and pay for a community placement for him. The case was argued on September 25, 2003, and a decision is pending.

"Approximately 69 percent of the division's caseload involves juvenile court litigation (juvenile dependency and termination of parental rights proceedings)."

Spokane Division

"Spokane attorneys are assigned to one of four sections: Social & Health Services, Labor & Industries, the Spokane Interdivisional Section and Torts."

● Summary of Responsibility

- The Spokane Division provides a wide range of legal services to many agencies of state government and state institutions of higher education in eastern Washington. Additionally, nearly all consumer protection functions for the eastern half of the state are located in the Spokane Division. The Spokane Division consists of 27 assistant attorneys general and approximately 55 additional staff including legal assistants, paralegals, investigators, professional support staff, law students, volunteers and other students.

● Legal Services Provided

- Spokane attorneys are assigned to one of four sections: Social & Health Services, Labor & Industries, the Spokane Interdivisional Section and Torts.
- **Social & Health Services:** Some of the state agencies served by our Social & Health Services Section are the Division of Children & Family Services, Aging and Adult Services, Division of Child Support, Community Services Offices and Eastern State Hospital. They also handle various licensing matters including day care, foster care, boarding home and adult family home facilities.
- **Labor & Industries:** This section handles industrial insurance appeals, cases involving the Washington Industrial Safety and Health Act, and fraud cases before the Board of Industrial Insurance Appeals and in the trial courts in Spokane County and several other eastern Washington counties.
- **Spokane Interdivisional Section:** This section handles consumer protection matters, representation of institutions of higher education including Eastern Washington University, Big Bend Community College, Educational Service District 101, Community Colleges of Spokane and Labor and Personnel matters for state agencies in eastern Washington.
- **Torts:** This section represents state agencies, boards and commissions and state officials who are sued where the case arises in eastern Washington. In addition, one attorney specializes in employment related suits. Typical tort clients include the Department of Social and Health Services, Department of Corrections, Department of Transportation and various institutions of higher education.

Spokane Division

The Spokane Division also represents the Spokane Intercollegiate Research and Technology Institute involving technology transfer and economic development helping companies take science to the market place and the Eastern Washington State Historical Society.

Numbers/Trends

Increased methamphetamine usage and general drug usage in eastern Washington has impacted the type and number of juvenile court cases filed regarding child abuse and neglect, especially in the area of neglect. Approximately two child abuse cases are filed each working day. This trend has led to an increase in cases terminating the parental relationship.

Consumer protection calls and written complaints to the Spokane Division increased about eight percent to approximately 1,300 per month focusing mainly on auto repair, auto sales, and telecommunication issues.

Tort claims assigned to Spokane remain high including several "priority" cases where the prayer for relief can be over \$1 million and/or contain an issue of state-wide significance.

Significant Cases

The Spokane Division's Consumer Protection team has, in conjunction with AARP, initiated the beginning of a state-wide senior fraud education program. This training has created over 650 "Fraud Fighters" equipped to educate others regarding fraud directed at our senior citizens.

Information about significant cases is reported elsewhere in this report under the applicable division report for the substantive legal work that is handled in Spokane.

"Increased methamphetamine usage and general drug usage in eastern Washington has impacted the type and number of juvenile court cases filed regarding child abuse and neglect, especially in the area of neglect."

Tacoma Division

"The division has partnered with Pierce County Superior Court, Department of Assigned Counsel of Pierce County, Pierce County Alliance and the Division of Children and Family Services Region 5 to develop a nationally recognized Family Drug Court."

● Summary of Responsibility

- The Tacoma Division provides a wide range of legal services to many agencies of state government. The Tacoma Division consists of 26 assistant attorneys
- general and approximately 26 additional staff including legal assistants, paralegals, and other professional support staff. The General Service staff
- of four provide quality reception, supply ordering, copy projects and other support to this office of 52, as well as to an additional two sections, Consumer
- Protection and Medicaid Fraud.

● Legal Services Provided

- Tacoma attorneys are assigned to one of the three sections: Social & Health
- Services, Labor & Industries and Licensing & Administrative Law.
- **Social & Health Services:** Some of the state agencies served by our Social & Health Services Section are the Division of Children and Family
- Services and Aging and Adult Services. They also handle various licensing matters including day care, foster care, boarding home and adult family
- home facilities.
- **Labor & Industries:** This section handles industrial appeals and cases involving the Washington Industrial Safety and Health Act before the Board
- of Industrial Insurance Appeals in the trial courts in Pierce and Kitsap County.
- **Licensing & Administrative Law:** This section represents the Employment
- Security Commissioner in unemployment appeals in Kitsap and Pierce County Superior Courts. This section represents the Department of Licensing in
- Kitsap and Pierce County Superior Courts appeals of license revocations of suspensions.

● Numbers/Trends

- Increased methamphetamine usage in Pierce and Kitsap Counties has impacted the type and number of juvenile court cases filed regarding child
- abuse and neglect, especially in the area of neglect. Approximately two child abuse cases are filed each working day. This trend has led to an increase in
- cases terminating the parental relationship. The division has partnered with Pierce County Superior Court, Department of Assigned Counsel of Pierce
- County, Pierce County Alliance and the Division of Children and Family

Tacoma Division

Services Region 5 to develop a nationally recognized Family Drug Court. In that court over 100 people will be served with the goals of treating the parents of their chemical addiction while working hand-in-hand towards the best interests of their children.

Significant Cases

Cases of significance and major issues and events are included in the main divisions' reports.

Transportation and Public Construction Division

"Client advice topics range from land use and environmental permitting issues to construction contracting and constitutional issues on the use of state gas tax revenue."

● Summary of Responsibility

- The Transportation and Public Construction Division (TPC) represents the Washington State Department of Transportation (DOT) as it designs, constructs, operates and maintains Washington's highway system and other multi-modal transportation operations (Washington State Ferries, rail, aviation, freight transport, public transportation, etc.). Other division client agencies include: the Washington Transportation Commission, the Board of Pilotage Commissioners, the County Road Administration Board, the Transportation Improvement Board, the Washington Traffic Safety Commission and the Freight Mobility Strategic Investment Board. Division attorneys also use their experience in eminent domain, contracts, construction, land use and environmental law to support the construction activities of other state agencies.

● Legal Services Provided

- TPC's workload is a mix of moderate to complex litigation and client advice on a wide range of issues. In addition to a steady condemnation caseload, TPC attorneys handle construction claims and environmental litigation, both regulatory compliance and defense of hazardous waste claims, as well as land use issues that arise in connection with state projects. In addition, division attorneys handle a number of tort cases seeking recovery of property damage allegedly caused by floods and landslides. Client advice topics range from land use and environmental permitting issues to construction contracting and constitutional issues on the use of state gas tax revenue.

● Numbers/Trends

- The division is currently handling 133 open lawsuits and appeals and 101 open advice files.
- The division's workload can vary depending on the level of investment in new or expanded transportation projects and the level of construction undertaken by client agencies. There has been a dramatic growth in the division's advice in project construction due to accelerated project planning, mega-project scoping (I-405, SR 520 Floating Bridge, Alaskan Way Viaduct, Sound Transit), unusual environmental impacts and mitigation strategies, and new project delivery and finance methods (like design-build contracting) which present complex and novel legal questions.

Transportation and Public Construction Division

The division has also seen growth in its environmental and land use practices as claims arise under the Endangered Species Act, Clean Water Act, SEPA and NEPA as transportation construction proceeds. Environmental permit streamlining issues and land use requirements from a large number of local jurisdictions faced with state highway construction have also increased demands on our environmental and project litigation teams.

The number of property tort claims handled by the division is expected to grow due to heavy rains and flooding in late 2003.

The division also handles construction and environmental/land-use mediation and litigation for agencies other than DOT. Recent cases involve prison construction by the Department of Corrections, sexual offender transitional facilities for DSHS, \$7 million in claims related to the construction of a historical museum near Spokane and claims against DSHS related to Western State Hospital construction.

The division has also seen growth in its Tribal practice areas as construction projects (a ferry terminal at Edmonds and a pontoon construction dock near Port Angeles) raise important archaeological and project management issues under the federal National Historic Preservation Act.

"In 2003, division attorneys resolved 17 cases, acquiring \$34 million worth right-of-way for DOT construction projects around the state."

Significant Cases and Their Impact

DOT Condemnations: In 2003, division attorneys resolved 17 cases, acquiring \$34 million worth right-of-way for DOT construction projects around the state. The division's condemnation caseload is expected to triple with the new transportation finance package developed during the 2003 legislative session.

Stafford Creek Correctional Center: TPC is currently working with specially appointed assistant attorneys general to prepare for \$25 million construction claims from a prime contractor and 12 sub-contractors regarding change orders and terms in a prison construction contract. Division attorneys successfully resolved the mediation phase of a second layer of construction claims totaling about \$4 million. Trial is set for September 2004.

Second Narrows Bridge: Division attorneys successfully resolved a series of superior court and appellate court challenges to the financing and contract structure of the second narrows bridge in Tacoma. The bridge raised several new areas of law due to its creative design-build contract.

WSDOT v. Seacoast Towing: Division attorneys have worked with DOT to recover nearly a million dollars in taxpayer funds used to repair the SR 520 floating bridge after a barge hit it a couple of years ago. Despite intensive negotiations, litigation with the barge owner and its insurance company is ongoing.

Construction Contract Claims: Division attorneys devote considerable time to avoiding and resolving claims from contractors on highway construction

Transportation and Public Construction Division

- projects. Nonetheless, each year a number of such claims are presented by contractors seeking recovery for cost overruns. Many claims are settled
- either through negotiations or as a result of a Dispute Review Board hearing, but only after substantial preparation for the possibility of litigation.

● Major Issues/Events

- **Environmental Issues:** As DOT projects continue to impact both the natural and built environment, the division continues to see growth in its permit-related advice and litigation caseload. DOT has a collaborative working relationship with the Washington State Department of Ecology and lawyers for each assist that effort regularly.

- **Washington State Ferries:** Division attorneys continue to work collaboratively with the Washington State Ferries, U.S. Coast Guard, the
- Washington State Patrol, and other agencies to assess federal security guidance for passengers, terminals and vessels in light of state constitutional
- protections. Ferry procurement, labor issues and environmental matters associated with ferry design and operation have also seen increased demands
- for legal services.

- **Accelerated Projects/Changing Project Delivery:** With the current pressing demands to deliver the transportation projects funded in the 2002 legislative session, and the need for expansion and maintenance projects to happen quickly to maximize economic stimulus and restore needed infrastructure, the division has advised project managers on a wide variety of mega-project design-build issues, risk allocation, innovative construction claims processes, unique financing arrangements, ballot measure impact (e.g. I-776) and multi-party operations initiatives with private and public parties (e.g. Sound Transit).

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Utilities and Transportation Division



Summary of Responsibility

The Utilities and Transportation Division provides legal services to the Washington Utilities and Transportation Commission (WUTC or commission). The commission regulates, in the public interest, the rates, services, and practices of privately owned utilities as well as a number of transportation companies doing business in the state. These include telecommunications, electric, gas, and water companies as well as pipeline companies, solid waste companies, private ferries, buses, and certain aspects of railroads, such as rail crossings and train speeds.

Legal Services Provided

The division principally handles regulatory litigation. The division represents the commission in court, both on appeals from commission decisions and in original actions, as well as in proceedings before various federal agencies, including the Federal Energy Regulatory Commission (FERC) and the Federal Communications Commission (FCC). The division represents the commission's staff in rate proceedings and other regulatory actions before the commission. It also assists in the disposition of more than 2,200 formal filings considered annually by the Commission.

Numbers/Trends

The division currently is handling 16 cases in state and federal courts and nine formal federal administrative agency cases (not including participation in rulemaking proceedings before the FCC and the FERC). In addition, the division is handling a large number of administrative cases before the WUTC, ranging from complex rate and pricing proceedings to smaller cases impacting only a few consumers. The vast majority of matters before the commission are resolved without formal adjudication. They are either non-controversial or resolved through negotiation or other alternative dispute resolution processes. Many matters are resolved at the regularly scheduled open meetings of the commission.

"The division represents the commission's staff in rate proceedings and other regulatory actions before the commission. It also assists in the disposition of more than 2,200 formal filings considered annually by the Commission."

Utilities and Transportation Division

Significant Cases

- **Review of Qwest's Compliance with Long-Distance Entry Requirements:** Section 271 of the federal Telecommunications Act of 1996 allows former Bell operating companies, such as Qwest, to offer interLATA (interstate or out of region) long-distance service once they have satisfied a 14-point checklist that signifies there are no barriers to competition in local telephone markets. The commission recommended that the FCC approve Qwest's application, which it did. The commission is monitoring Qwest's compliance with the checklist items.

Rate Cases

- PacifiCorp petitioned for a deferral account for certain asserted excess power costs. The commission denied this request, but allowed the company to file a general rate case before the end of 2003. This order has been appealed. The commission anticipates that PacifiCorp will file a general rate case before the end of 2003.

- Puget Sound Energy (PSE) filed a request to increase rates by almost five percent (or \$65 million) for its 972,000 customers, which would increase the typical residential monthly bill by about \$3.40. In this power cost case, the commission will consider PSE's proposal to purchase a 50 percent interest in the Fredrickson power plant and PSE's embedded power costs.

- Northwest Natural Gas Company (NWN) filed a request to increase rates by about 16 percent (or \$7.9 million). The request would increase the average monthly residential gas bill by \$9.16. NWN claims the increase is necessary due to the costs of extending facilities for a fast-growing customer base, loss of revenue due to decreased consumption, and other business cost increases. Work on these rate cases will continue through the summer of 2004.

- **Revenue From Directory Publishing:** Qwest filed with the commission a petition to sell its directory publishing business (Qwest Dex) for \$7.05 billion. Qwest and other parties to the proceeding reached a settlement, with the significant terms being approval of the sale and a \$30 credit per telephone line. The commission's staff opposed the settlement. The commission deferred consideration of the settlement and conducted a hearing on the merits. At the conclusion of the hearing, the commission approved the settlement. As a result, Qwest customers received a one time \$30 credit on their telephone bills in the fall.

- **Customer Privacy:** Verizon Northwest challenged the commission's newly adopted customer privacy rules for telecommunications companies in federal district court on the grounds that the rules violate its commercial speech rights. The court ruled against the commission, holding that the commission had a compelling interest in protecting customer privacy, but the rules were not narrowly tailored to further that interest.

- **Verizon's Access Charges:** The commission decided a complaint brought by AT&T against Verizon's access charges. Access charges are charges long-distance companies pay local exchange companies for access to the local

Utilities and Transportation Division

network to originate and terminate long-distance calls. AT&T claimed that Verizon's access charges were excessive and discriminatory. After a hearing, the commission ordered Verizon to reduce its access charges by \$32 million. Verizon petitioned for judicial review of this order and sought a stay, which was denied by the superior court. Verizon unsuccessfully challenged the denial of the stay at the court of appeals and state supreme court.

FCC's Triennial Review Proceeding: The FCC issued its Triennial Review Order in September 2003. The TRO reflects the FCC's examination of the state of competition in the market for local telephone service. Most notably, the FCC delegated to state commissions the authority to conduct a state-specific proceeding to determine which parts of the telephone network (such as the wires that run from switching offices to customers' homes and businesses) incumbent monopolists should be required to lease to their competitors. The commission is conducting a proceeding pursuant to the FCC's order.

"The Office of the Attorney General has independently worked against SMD through comments to FERC and by communications with Washington's Congressional delegation."

Major Issues/Events

Energy Regulation: The heavy workload in energy has continued through the past year. The commission actively participated in the FERC's highly controversial proposed rulemaking on Standard Market Design (SMD). The FERC's SMD proposal would require all electric utilities to turn over control of their transmission facilities to a regional transmission provider, a single tariff for all transmission customers (including bundled retail customers), and uniform rules for wholesale electricity markets throughout the country. The Office of the Attorney General has independently worked against SMD through comments to FERC and by communications with Washington's Congressional delegation.

Competition in Telecommunications Markets: The commission is continuing proceedings to determine the costs and prices that telecommunications companies may charge their competitors when those competitors seek to use each others' networks to offer service.

Professional Services



Administration Division



Summary of Responsibility

The Administration Division provides nonlegal services for the Attorney General's Office and is divided into six offices: Fiscal and Budget, Human Resources, Facilities, Information Services, Law Library and Public Affairs.

Services Provided

Support services include centralized budgeting and accounting, personnel and training, library resources, planning and technical support for the office's computer systems, management of the office's buildings, internal and external communications and general office administration.

Numbers/Trends

Fiscal/Budget: The Fiscal Office is divided into four sections -- Accounting Services, Budget, Payroll and Purchasing.

Accounting Services annually processes approximately 145,000 transactions for vendor payment and employee travel reimbursement.

Budget annually processes 3,000 legal services billings to state agencies, boards and commissions. These billings provide revenue to support legal operations of approximately \$75 million annually. In order to bill client agencies, approximately 9,000 staff timesheets are processed each year. The unit monitors approximately 165 client budgets. In addition, the unit provides expenditure and revenue monitoring and support for 69 separate divisions within the AGO. The unit also prepares and submits approximately 100 fiscal notes each biennium.

Payroll processes a semi-monthly payroll for approximately 1,200 employees (including work-study students and law clerks) totaling \$2.57 million, or an annual total of about \$61.7 million. The unit also processes an average of 2,681 leave slips per month and an average of over 32,172 per year. Over 2,150 timesheets are processed annually for the part-time and work-study employees (this figure does not include times sheets for volunteers).

Purchasing processes approximately 700 field/purchase orders annually. They also process 2,800 invoice vouchers for other types of purchases. The Supply Center takes advantage of volume purchases which saves the agency over \$2,000 annually.

"Budget annually processes 3,000 legal services billings to state agencies, boards and commissions. These billings provide revenue to support legal operations of approximately \$75 million annually."

Administration Division

- **Human Resources Office:** The Human Resources Office received and processed approximately 1,376 applications for employment in 2003.
- More than 500 applications were submitted for attorney positions, while approximately 340 applications were received for law clerk positions. From the applications received, the office appointed approximately 43 attorneys, made offers to 8 third-year law students for 2004 and made 38 offers for law clerk positions. Approximately 76 appointments were made into Washington General Service in 2003.
- Training staff in the Human Resources Office coordinated 345 classes in 2003 with a total attendance of 6,350. The 345 classes included 36 continuing legal education courses, 14 specialized classes for professional staff on topics such as court procedures, citations and proofreading, 4 specialized paralegal classes, and 34 management/supervisory classes for the attorney manager and lead professional staff. Training classes utilizing in-house expertise also included 98 computer technology classes, 90 library research/legislative history classes, 30 fiscal related classes, 17 ethical standards and sexual harassment and prevention classes. Seventeen divisional specific classes were also offered on subjects such as juvenile issues, bankruptcy and taxing and higher education related law. A State-County-Tribal Justice Summit was also held for tribal leaders, law enforcement, tribal counsel, county and state officials and prosecutors. Most of the training in the Attorney General's Office is conducted by in-house experts resulting in a low cost to the agency of approximately \$13 per participant.
- In 2003, an additional 830 employees participated in training classes outside the Attorney General's Office, including electronic learning (e-learning). Eight staff participated in the tuition reimbursement program which reimburses them for courses taken at colleges and universities
- Desktop training via computer video streaming was experimented with this year, providing AGO TV training on Ethics.
- The Human Resources Office manages a highly successful peer-driven employee recognition program for tenure and outstanding achievement. In 2003, the Attorney General recognized 44 employees for their extraordinary contributions to the office in fulfilling its mission, and 175 employees were recognized for their length of service to the state.
- Human Resources staff completed over 40 workstation ergonomic assessments this past year. Human Resources staff have worked in concert with division managers to assure accommodations were made for 20 employees with disabilities. Twenty-two Labor and Industries claims were filed by employees in 2003 and 11 other on the job incident reports were recorded.
- **Facilities:** The Attorney General's Office operates 19 facilities across the state. Staff members are also housed with client organizations at six additional locations including major universities, state agencies and regional juvenile detention facilities. Together they house nearly 1,200 employees at an annual lease cost of over \$10.5 million.
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Administration Division

Information Systems: The office network contains 56 Compaq servers with a total storage capacity of 6.5 terabytes. Currently there are over two million user files maintained on the networks that use 2.9 terabytes of the office's server capacity. The network experienced a 99 percent uptime last year.

- ISD Customer Support Call Center processed 13,602 contacts last year including 830 purchase requests.
- ISD held 89 classes, offering 11 different technical training courses, to 579 students in 2003.
- The Office e-mail system contains 1,831 mailboxes containing 17 million messages.
- In the last year ISD purchased, installed, and surplused over 650 workstations and laptops.
- ISD has blocked over 21,000 viruses from entering the AGO network for the State Governmental Network in the past year.
- ISD blocks approximately 500,000 intrusion attempts at its firewall each month.

"ISD has blocked over 21,000 viruses from entering the AGO network for the State Governmental Network in the past year."

Library: Two research librarians provided reference assistance and in-depth research services to the more than 500 attorneys and paralegals. An initiative instituted last year to provide Washington Legislative Histories, upon request, for the AAGs has become very popular and saves AAGs significant research time. Staff continues to centrally order, check-in and distribute all publications ordered by office staff.

Training classes consisted of Internet-based instruction including Westlaw, West Check, Keycite, LegLink, Courtlink and LexisNexis. About 623 staff attended 89 training classes which were delivered or coordinated by the Law Library staff in 2002. The classes were on efficient usage of online research services as well as the more traditional research methods the agency uses to investigate legislative intent.

Public Affairs: The Public Affairs Unit supported the Solicitor General on a highly publicized case before the U.S. Supreme Court in early December. The case, *Locke v. Davey*, raised significant questions about the meaning of state and federal constitutional provisions pertaining to the relationship between church and state. Public Affairs prepared informational materials, arranged a briefing for local, state and national news media, and coordinated interview requests before, during and after the Supreme Court argument.

Public affairs assisted the Consumer Protection Division on efforts related to the state's major settlement with Household International, one of the country's largest lenders in the sub-prime mortgage market. The unit helped develop informational materials for the approximately 12,000 Washington residents eligible to receive restitution under the settlement, arranged a press briefing and developed a website providing settlement updates and other information.

Public Affairs staff worked with ISD to integrate the agency's internal newsletter, Good Morning AGO, into a broad-based Intranet information

Administration Division

"ISD successfully developed and deployed an office-wide Administrative Services Intranet known as InsideAGO. This innovative site is an employee centric platform for the delivery of the administrative services offered by the Human Resource, Fiscal, Information Service, Law Library, Public Affairs and General Service business units of the Administration Division."

- source called Inside AGO. The office's daily media clip service compiled by Public Affairs was also incorporated into the new format.

● In addition, Public Affairs:

- - Prepared and distributed 79 news releases.
 - Responded to an average of 15 media calls each day.
 - Researched and wrote an average of four major Attorney General speeches each month.
 - Responded to approximately 700 constituent phone calls, letters and emails per month.
 - Provided graphic design and webmaster services to the office.

● Major Issues/Events

- **Prime Migration:** The agency's Prime mainframe computer system was finally retired on March 28, 2003. The retirement of this equipment marks the end of the mainframe era at the AGO. This machine used to provide all of the agency's core business systems such as the timekeeping and billing systems, word processing, and the office's docketing systems.

- **Administrative Services Intranet:** ISD successfully developed and deployed an office-wide Administrative Services Intranet known as InsideAGO. This innovative site is an employee centric platform for the delivery of the administrative services offered by the Human Resource, Fiscal, Information Service, Law Library, Public Affairs and General Service business units of the Administration Division. A key feature of this Intranet is that it allows administrative service providers the ability to contribute and manage their own service content using basic Microsoft Office Suite tools such as Word and Excel.

- **Office XP:** ISD completed the Office Suite upgrades from Microsoft Office 97 to Microsoft XP. This project included "just-in-time" instruction for agency employees. Also included in this upgrade was the implementation of the Microsoft Sharepoint Service which provided the software required for establishing an office-wide document repository for attorney work product (see CMS Document Repository and Agency Brief Banks project below).

- As part of this project ISD began using an automated software deployment tool known as Altiris to manage the deployment of desktop software and security updates. With new security concerns and an on-going aggressive use of modern technology, daily updating of desktop software is now mandatory at the AGO. The Altiris tool has made it possible to continue managing the AGO computing environment without increasing information technology staff.

- **CMS Document Repository and Agency Brief Banks:** ISD is currently implementing an agency-wide brief bank using the newly installed Microsoft SharePoint Service. This service allows attorney work product (brief, advice, memos, letters, etc.) to be "published," versioned, indexed, key-

Administration Division

word searched, and retrieved from any office location across the AGO network. This project is a crucial first step in moving the agency towards comprehensive electronic file management business practices which will include such things as the integration of digital scanners, electronic court filing and notification, electronic mail archiving and browser-based electronic file management.

Securing HITS/SMART: ISD implemented a Citrix network so that the AGO Homicide Investigation Team (HITS) staff can securely access the HITS systems. This implementation marked the completion of the legislatively funded SMART project for recidivist tracking. In addition to the SMART upgrades, HITS systems now contain up-to-date Department of Licensing and Department of Motor Vehicles data and an on-going information management support service is now fully in place for the HITS program.

Phone Replacement Project: ISD is working on a conversion plan that will replace the AGOs aging phone system with a state-of-the-art Voice over Internet Protocol (VoIP) phone system. This highly-cost effective phone system will use the existing AGO computer network and it can be integrated with the existing e-mail system and other AGO computer applications.

Managed Print Services Project: The AGO successfully issued an RFP to contract with a single vendor to supply a comprehensive set of print services to the agency for all copier, fax, printer, and scanner equipment. The agency expects to save tens of thousands of dollars in print costs with this new contract which it intends to begin implementing in early 2004.

IT Security Program: A project has just been started to establish an agency-wide security and disaster recovery program for the AGO that meets the Information Services Board and the Department of Information Services security requirements. This project includes the installation of a new CITRIX-based remote access service, secured digital certificates for agency staff that need them and tighter site security for agency IT facilities.

Back Office Upgrades Project: Project planning for replacing all file servers and Microsoft BackOffice software is currently underway.

Case Management System (CMS) Enhancements: The agency's case management system has been extensively customized to integrate with the new Microsoft Office Suite and to extend its reporting capacities to accommodate the agency's new performance-based accountability program (AGMAP).

Recruitment Challenges: Recruitment difficulties continue to be felt in the legal field. Qualified legal secretaries are still in short supply and competition for those individuals completing formal training programs remains high. Our agency is considering additional in-house training projects to help ease this situation.

More mid-level managers will be leaving their positions to retire and there is a shortage of internal candidates with sufficient institutional knowledge to immediately move into these key positions. Projects, such as the

"ISD is working on a conversion plan that will replace the AGOs aging phone system with a state-of-the-art Voice over Internet Protocol (VoIP) phone system."

Administration Division

- development of a professional staff mentoring program and a lead academy are under consideration.

- **Assignment Pay:** In April 2001 the Attorney General's Office presented a request to the Personnel Resources Board that our Agency be able to apply assignment pay to increase our competitive edge in retaining quality legal secretarial staff and to provide some leverage in recruiting new staff to fill these key positions. On April 16, 2001, the Personnel Resources Board established a one-year project over which time the resulting benefits for the use of assignment pay could be monitored. On March 14, 2002, the project was renewed for an additional year, with the caveat that the effectiveness of the program would be evaluated.

- At the end of the two year project evaluation period, it was determined that the application of assignment pay for legal secretary staff in Seattle had effectively demonstrated a lower turnover rate, fewer staff vacancies, and a decreased cost to the office for using temporary agency legal secretaries.

- In mid-March 2003, the Personnel Appeals Board permanently adopted Assignment Pay for the legal secretary staff in downtown Seattle.

- **Civil Service Reform:** The Department of Personnel has been meeting with the Attorney General's Office, other state agency and higher education human resource professionals along with union representatives on the preliminary draft rules and classification structure for the new civil service system. The Attorney General's Human Resources Office has been and will continue to be actively involved in the development and implementation of these sweeping changes to the state's civil service system. The HR staff will also continue to keep the AGO apprised of the state's progress.

- **Resource Sharing Program:** The Attorney General's Office established the Resource Sharing Program in the early spring of 2002 in response to the state budget cuts. The goal of the program was to make the most of staff resources within the Agency and to respond to workload issues in the most economic and resourceful manner possible. Since the inception of the program, the committee has successfully placed more than 35 staff ranging from Office Assistant Senior, Legal Secretary, and Paralegal in various divisions state-wide to meet critical needs.

- **On-Line Catalogue System:** The Law Library has created an online catalog for the office. WAG-O-Cat is an Internet-accessible catalogue of the Law Library's collection and (eventually) the library collections of all of the office's divisions. This will enable access to and use of shared materials -- facilitating research and assisting the divisions in maintaining and developing their own collections.

- **Safety Assessment:** The office completed a safety assessment of all offices in 2002. The goal was to bring all offices up to basic safety levels.

- **Thurston County Offices:** The agency continues its long-range goal to consolidate its Thurston County offices. Plans are being finalized to consolidate eight divisions from four locations into a new facility being

Administration Division

constructed in Tumwater. The consolidation will take place in 2005 and 2006.

Hazard Mitigation Plan: This year the Facilities Office developed a Hazard Mitigation Plan to prepare agency facilities to face natural disasters. In addition a Sustainability Plan was adopted to reduce waste and energy consumption and to alter employee attitudes toward the environment.

Policy and Government Relations Unit

"As part of the comprehensive Internet-safety campaign entitled Safety Net, the Attorney General visited 23 middle schools in 20 communities and made presentations to over 1,500 students, several parent groups and civic organizations, and met with nearly every law enforcement agency in Washington."

● Services Provided

- The Policy and Government Relations Unit helps develop AGO policy initiatives and legislation. The unit also serves as the AGO liaison with stakeholders, the Legislature, Congress and the National Association of Attorneys General (NAAG).

● Initiatives

- **Safety Net:** The Policy and Government Relations Unit led the Attorney General's public education efforts on Internet and high tech crime. As part of the comprehensive Internet-safety campaign entitled Safety Net, the Attorney General visited 23 middle schools in 20 communities and made presentations to over 1,500 students, several parent groups and civic organizations, and met with nearly every law enforcement agency in Washington.
- The unit built partnerships with statewide law enforcement organizations, organized the day's events in each community, developed two PowerPoint programs targeting middle school students and parents respectively, copied the presentations and talking points to CD-ROM and shared with law enforcement statewide and attorneys general nationwide, drafted new legislation to amend the state's Communication with a Minor statute, and led the development of the AGO Safety Net webpage and Internet-themed speeches. In addition, the unit managed a statewide ListServ for law enforcement to share information or post inquiries on electronic crime. It continues to be an active partner with stakeholder organizations on computer and technology-related issues.
- **NAAG Internet Conference:** The Policy Unit, in partnership with the University of Washington's Shidler Center for Law, Commerce, and Technology, organized NAAG's Third Annual Law Institute. The two-day conference at the UW's Henry Art Gallery dealt with a variety of legal issues related to the Internet. State attorneys general, media representatives, industry groups, and other attendees heard from journalists, lawmakers, and from federal and state law enforcement officials. Conference topics included: demonstrations on trapping hackers from Stanford and UW; updates on high tech legal developments; and Internet safety demonstrations including a live chat and the AGO Safety Net slideshow.
- **Get the Facts Campaign:** The Policy and Government Relations Unit led a comprehensive public education campaign on new and emerging consumer issues. The paid-media campaign, entitled "Get the Facts...", included paid

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radio and television spots that ran on the Seattle Mariner Radio Network from June through September. The network has the broadest demographic listener base and includes 22 stations reaching over one million listeners per week. AGO employees "acted" in the television ads which included consumer messages on identity theft, Internet safety, wireless phones, spam, and prescription drugs. The television ads ran during a special section of the 5:00, 6:30 and 11:00 news called the "Mojo Minute." Each ad referred consumers to the AGO webpage for more information.

Risk Management Reviews: The Policy and Government Relations Unit participated in the creation and implementation of a new AGO critical events policy. The unit met with approximately 250 AGO staff members while conducting risk management reviews. The unit will continue the division reviews this year before releasing a report and recommendations in 2004.

Tobacco: The unit assisted NAAG in enforcement of the tobacco Master Settlement Agreement and participated in several multi-state enforcement actions. Results included nearly \$3 million in additional tobacco funds to the state from new settlements and a dispute resolution as well as settlements with retail chains that will reduce underage sales.

Roll Call Trainings: In partnership with DSHS, state and federal law enforcement agencies and the private sector, the Policy and Government Relations Unit helped develop and/or distribute roll call trainings to approximately 325 state, local and tribal law enforcement agencies. The roll call trainings are video presentations and supporting information on CD-ROM meant to be played at roll call or reviewed on patrol car computers. The CDs -- which address vulnerable adult abuse and identity theft -- helps meet law enforcement's request for more training for less cost. A third CD will be released soon regarding terrorism indicators and response.

Domestic Violence: The policy unit worked closely with the AGO Domestic Violence Awareness Committee on several initiatives related to domestic violence.:

- **Officer Involved Domestic Violence Symposium:** Following the murder of Crystal Brame by Tacoma Police Chief David Brame, the AGO led an effort to explore the issue of domestic violence when police officers are involved. Over 400 law enforcement officers, city officials, domestic violence victim advocates, and others attended a day-long seminar to learn and discuss this important issue.
- **Teen Dating Violence Brochure:** In partnership with the Washington State Medical Association and the National Crime Prevention Council, the AGO developed a teen dating violence brochure based on the AGO website. 20,000 copies were distributed to doctors as well as school nurses and counselors statewide.

Teen Dating Teaching Module: Seven schools piloted a teen dating violence teaching module co-developed with an outside contractor. The module features music and class discussion.

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Office Locations

